

# A Post-race Equal Protection?

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## INTRODUCTION

The concept of “discrimination,” like the phrase “equal protection of the laws,” is susceptible of varying interpretations, for as Mr. Justice Holmes declared, “[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the

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circumstances and the time in which it is used.”<sup>1</sup>

As the above quote from Justice Powell’s opinion in *Regents of the University of California v. Bakke* indicates, equality has been a shifting concept throughout U.S. history.<sup>2</sup> Given the growing popularity of and significant societal turn toward a so-called “post-racial” ideology, it is appropriate to consider what influence this perspective is likely to have on the U.S. Supreme Court’s interpretation of equality.<sup>3</sup> Most vividly demonstrated in the 2008 election of the first African-American President of the United States, post-race is a term that has been widely used to characterize a belief in the declining significance of race in the United States. As used in this Essay, post-racialism is a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America’s and Americans’ pronounced racial progress. One practical consequence of a commitment to post-racialism is the belief that governments—both state and federal—should not consider race in their decision making.<sup>4</sup> One might imagine that the recent explosion in post-

1. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (quoting *Towne v. Eisner*, 245 U.S. 418, 425 (1918)).

2. Additionally, as Justice Marshall once concluded, the government the Framers devised was prejudiced and flawed from its very inception, and it took a war and several amendments to arrive at our current Constitution. As such, “We the People” is not a phrase frozen in time, but it must be understood that the Constitution is an evolving document and that terms like “liberty,” “equality,” and “justice” will necessarily be contested. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 1–4 (1987).

3. However defined, equality is protected by the Equal Protection Clause of the Fourteenth Amendment, which states, in part, “[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. In addition to definitional challenges, determining the appropriate level of judicial review is critical in most equal protection cases, with varying levels of scrutiny applying to different classifications. This tiered approach began in *Carolene Products*, where the Court first indicated that governmental action against “discrete and insular minorities” may require more searching judicial review. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938). The Court later declared that “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.” *Korematsu v. United States*, 323 U.S. 214, 216 (1944). This level of review is now typically referred to as strict scrutiny and requires the government to establish a compelling interest, achieved through narrowly tailored (the least restrictive) means, for racial classifications. *Cf.* Eric K. Yamamoto et al., *Contextual Strict Scrutiny*, 49 HOW. L.J. 241, 242 (2006) (arguing that the Court’s application of strict scrutiny has been context specific and that, through interpretation, the Court has shifted from a narrow means–ends analysis to one that involves a “genuine searching judicial inquiry into the linkage of racial group history to current social and economic conditions undergirding the challenged classification”).

4. *See, e.g.*, Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (“[P]ost-racialism in its current iteration is a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies . . .”). Professor Cho claims that the ideology, one component of which is a belief in “race neutral universalism,” is so powerful that post-racialism actually became a predominant strategy within the Obama presidential campaign. *Id.* at 1592–93. Given the latter, post-race should not be narrowly pigeonholed as an ideology held only by political conservatives. *See id.* at 1592 (asserting that a “proliferation of intellectuals” of varying political ideologies have embraced post-racialism “as a guiding theoretical framework and *gestalt*”). For years, an array of scholars—across racial and political perspectives—has suggested that factors other than race (or race alone) are more important to life outcomes. *See, e.g.*, WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1978) (asserting that socioeconomic class may be more important to

racial discourse<sup>5</sup> portends a revised understanding of equality, one that will result in a significant change in constitutional race jurisprudence. This latter view ignores the history of the Court's horribly fraught race jurisprudence, portions of which have advanced post-race-like principles for nearly as long as the Justices have been considering the legal relevance of race.<sup>6</sup> In the *Civil Rights Cases*<sup>7</sup> and *Plessy v. Ferguson*,<sup>8</sup> two landmark nineteenth-century cases interpreting the scope of the Reconstruction Amendments,<sup>9</sup> the Court attempted to negate the importance of race, alternatively finding it to be either of no moment or a legitimate basis to segregate.<sup>10</sup> To be sure, it is hard to believe that the Court was unaware of the salience of race given the times in which these cases were decided. Yet the language and the reasoning that the Court employed

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life outcomes than race); Angela P. Harris, *From the Color Line to the Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52 (2008) (discussing the emergence of color and identity performance, rather than racial categories, as bases upon which future race-based benefits or disadvantage may turn).

5. Critiques of post-racialism have been prevalent in academic and media circles. See Symposium, *Beyond the Final Frontier: A "Post-Racial" America?*, 25 HARV. BLACKLETTER L.J. 1 (2009); Ian F. Haney López, *Post-racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama* 98 CAL. L. REV. (forthcoming June 2010), available at <http://ssrn.com/abstract-1418212> (describing how crime control rather than the diminishing salience of race contributed to the election of Barack Obama and how contemporary colorblindness characterizes any mention of race as racist); Gregory Parks, Jeffrey Rachlinski & Richard Epstein, Debate: *Implicit Race Bias and the 2008 Presidential Election: Much Ado About Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210 (2009), <http://www.pennumbra.com/debates/pdfs/ImplicitBias.pdf> (Parks and Rachlinski questioning why blogs and pundits embraced the 2008 election as post-racial, when there were numerous examples of implicit bias and the relevance of race to judgment; Epstein criticizing his co-authors as focusing on negative racial incidents in the face of our greatest racial achievement); Trina Jones & Mario L. Barnes, *Post-Racial? The U.S. Is Not Ready To Drop Safeguards*, L.A. DAILY J., Aug. 28, 2009, at 1, 8 (providing several examples of contemporary racial inequality and racialized attitudes to suggest that America is not post-race); Shelby Steele, Op-Ed., *Obama Seduced Whites with a Vision of Their Racial Innocence Precisely To Coerce Them into Acting out of a Racial Motivation*, L.A. TIMES, Nov. 5, 2008, at A31 (noting that persons committed to post-race select race as their primary frame of reference); *supra* note 4.

6. See *infra* notes 24–28 and accompanying text (discussing the early post-racial views evinced by the Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

7. 109 U.S. at 31–32 (striking down the Civil Rights Act of 1875, which attempted to prohibit private discrimination in the provision of public accommodations).

8. 163 U.S. at 550–51 (holding that segregated railroad accommodations for blacks and whites did not violate the Equal Protection Clause).

9. The Thirteenth, Fourteenth, and Fifteenth Amendments, also known as the Reconstruction Amendments, were designed to eradicate the formal effects of slavery. For an argument that neither colorblind nor race-conscious jurisprudence serves the equality goals of these amendments, see Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 487–88 (2003).

10. These cases do not represent the abandonment of racial considerations, so they are not offered as precise examples of the modern iteration of post-race ideology. Quite to the contrary, in the *Civil Rights Cases* and *Plessy*, the Supreme Court “saw” race because it explored the meanings accorded racial classifications in that era. These cases, however, still represent powerful antecedents to, or early versions of, post-race-like perspectives. For example, the majority in the *Civil Rights Cases* suggested shortly after the end of slavery that former slaves should not continue to receive special protections under the law, which is akin to an assertion that freed blacks needed to “get beyond” race. See *infra* notes 24–26 and accompanying text.

in its opinions to justify both racial segregation and the limited use of the law as an affirmative mechanism for change were decidedly post-racial in that the Court's analysis denied the continuing significance of past racial oppression and the ongoing presence of racism.<sup>11</sup>

This tendency to ignore or minimize the substantive importance of racial difference in judicial opinions was, in effect, the Court's default approach to equal protection analysis for decades,<sup>12</sup> and it was not truly abandoned until *Brown v. Board of Education*.<sup>13</sup> Whatever one takes away from *Brown* and its progeny,<sup>14</sup> the Court's equal protection analysis in those opinions clearly acknowledged the social significance of racial categorization and racial outcomes.<sup>15</sup> In accepting the way that racial difference nearly per se led to racial disadvantage, *Brown* represented a decided retreat from the Court's earlier post-race-like jurisprudence.<sup>16</sup> The Court's explicit acknowledgment of the costs of racial differences in education and its willingness to meaningfully consider "the race

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11. The Court in *Plessy* adopted the ironic position that governments could constitutionally maintain systems of racial categorization or distinction without the categories being understood to create racial disadvantage. See *infra* notes 27–28 and accompanying text. This approach to equal protection created a distinction between discrimination as difference, which was lawful, and discrimination as disadvantage, which would presumably be unconstitutional. See Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1962–66 (2000). To the extent the *Plessy* majority claimed that laws maintaining "separate but equal" treatment created a distinction without disadvantage—except in the minds of blacks—the claim presumed that racial categories were neutral or of no consequence. As such, race was without salience, which is a claim at the heart of modern post-racialism.

12. As Justice Powell further opined in *Bakke*:

The Equal Protection Clause, however, was "[v]irtually strangled in infancy by post-civil-war judicial reactionism." It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract.

Regents of the Univ. of Cal. v. *Bakke*, 438 U.S. 265, 291 (1978) (footnote omitted) (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 381 (1949)).

13. 347 U.S. 483 (1954) (striking down state-sanctioned segregation and the separate but equal approach to equal protection within the area of education).

14. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18–20 (1958) (holding that, by virtue of the Supremacy Clause of the Constitution and the Court's power of judicial review, Arkansas was bound by the decision in *Brown*).

15. Prior to *Brown*, the Court allowed racial categorization and seemed to believe that equal protection only required equal treatment across categories (i.e., separate but equal). Not until *Brown* was the Court willing to hold that racial categorization itself was in certain circumstances inherently unequal. In that moment, the consequences of racialization became real for the Court. The Court's race-conscious analysis in *Brown* was followed by a legislative revolution that furthered the destruction of the separate but equal doctrine. See, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7 (2006); Voting Rights Act of 1965, 42 U.S.C. § 1971 (2006).

16. The point here is that the Court in *Brown* decided that government could not engage in systems of racial management where race was used as a basis to distinguish among groups but was also presumed not to matter. This acceptance of the substantive importance of racial distinction recognizes the salience of race, which of course is inconsistent with a portion of the modern post-race ideology. Ironically, however, to the extent one may claim that *Brown* stands for the proposition that observing racial distinctions is presumptively unlawful, *Brown* can also be viewed as a harbinger for the modern post-race perspective. See Harris, *supra* note 11, at 2006 (noting that connoting discrimination with

question”<sup>17</sup> ushered in a “raced” era of equal protection jurisprudence.<sup>18</sup> Yet less than twenty-five years after this historic decision, the Court began to pull back from this position and to move toward a reasoning that has now become fully embodied as post-racialism.<sup>19</sup>

The Court’s retreat from race began at least as early as *Regents of the University of California v. Bakke*. In *Bakke*, a four-judge plurality, with a fifth vote from Justice Powell, invalidated the use of racial set-asides to remedy past discrimination in education.<sup>20</sup> In examining the University of California, Davis, Medical School’s use of race in its admissions process, Justice Powell declared that remedying “‘societal discrimination’ does not justify a classification that

differentiation undermines the *Plessy* era of racial management, but also limits the availability of racial remedy).

17. The late Duke Law Professor Jerome M. Culp, Jr. described that question in the following manner: “[T]here is buried deep inside the legal structure a failure to want to ask what I have called the race question . . . . Stated simply, ‘How does race alter the contours of legal reality?’” Jerome M. Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The “Impossibility” of Permanent Reform*, 45 *RUTGERS L. REV.* 965, 966 (1993).

18. Here, “raced” is used as the antithesis of post-race. By “raced” we refer to the Court’s acknowledgment of the consequences of racial differentiation. A number of post-*Brown*, pre-*Bakke* cases took such an approach. See, e.g., *Griggs v. Duke Power*, 401 U.S. 424, 431 (1971) (holding that under Title VII of the Civil Rights Act of 1964, when workplace tests disparately impact ethnic minority employees, businesses must prove that the tests are consistent with business necessity and “reasonably related” to the jobs for which the tests are required); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443–44 (1968) (holding that Section Two of the Thirteenth Amendment gives Congress authority to prohibit private discrimination in the lease and sale of property). Others have used race as a verb to convey the notion that racialization or using race and its attendant meanings as part of a system of assignment is an active and intentional process. See, e.g., John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 *FORDHAM URB. L.J.* 1395, 1415 (2002) (“Race is the vehicle through which we can include or exclude; stratify or equalize; divide or combine. . . . [R]ace is a verb.”); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 *VA. L. REV.* 1805, 1806–07 (1993) (“[R]ace is a verb . . . we are ‘raced’ through a constellation of practices that construct and control racial subjectivities.”).

19. At least with regard to affirmative action programs designed to remedy the past effects of racial discrimination, the Court significantly retreated from allowing the state to use race as a basis for granting corrective benefits. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995) (adopting strict scrutiny as applicable to racial considerations in federal, state and local programs); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989) (holding that generalized assertions of past racial discrimination could not justify racial quotas in the awarding of public contracts); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (striking down the University of California’s consideration of race in the admissions program at the University of California, Davis, Medical School, but allowing a limited consideration of race as part of a multifactor process designed to ensure diversity). During this period of retrenchment, the Court also adopted an analysis that provided for strict scrutiny under the Equal Protection Clause only for cases involving purposeful state discrimination. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (applying the *Washington v. Davis* intentional discrimination standard to racially disparate results in Georgia’s administration of its death penalty); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring discriminatory intent in order to find a racially disproportionate impact unconstitutional).

20. The plurality, consisting of Justices Rehnquist, Stevens, Stewart, and Chief Justice Burger, concurred with Justice Powell’s determination that the U.C. Davis Medical School admissions program was unlawful. *Bakke*, 438 U.S. at 271. Parts of Justice Powell’s separate opinion, however, were also joined by Justices White, Brennan, Blackmun, and Marshall. They concurred with his determination that race could still be a factor in an appropriately designed admissions policy. *Id.* at 272.

imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”<sup>21</sup> Elements of this reasoning—that antidiscrimination doctrines should apply universally to all persons and should not punish those who are not responsible for the disadvantage the state seeks to correct—clearly speak to a post-racial ethic. Ultimately, Justice Powell articulated a minimized role for considerations of race in higher education admissions, as one component of securing a diverse student body rather than as a primary basis for admissions decisions.<sup>22</sup> Post-*Bakke*, however, it appears that Justice Powell’s vision of an equality that at least includes some capacity to account for race may be in danger as the Court’s more recent examinations of race in university admissions, as well as elementary and secondary school integration plans, signal a return to a greater embrace of post-racial ideology and analysis.<sup>23</sup>

Although moving beyond race has been a recurrent theme in the case law, it is unclear to what degree the current Supreme Court will adopt a post-race ideology in future examinations of equal protection. In the small space for discourse that remains, we offer this Essay as an illumination of the Court’s post-race past and a caution for its future. At bottom, we suggest that the history, social reality, and life circumstances of people of color in this country do not support a broad adoption of the post-racial perspective within equal protection analysis. In Part I, we explore the appeal of post-racialism. In Part II, we examine current events involving racial contests and offer statistical data that severely undermine the notion that race has lost its salience. We suggest, in Part III, how we might rethink equal protection doctrines—intentional discrimination and disparate impact theory—in light of post-racial commitments. Finally, we conclude by proposing that the Court place post-racialism in context, as an aspirational idea, one that presently is unlikely to help resolve the tension that exists between (1) society’s strong belief that overt individual discrimination has waned, and (2) the institutional and structural barriers that still result in disparate life outcomes along racial lines.

### I. THE IMPULSE TOWARD POST-RACIALISM

Professing American society to be post-racial is not new. Almost from the moment the Civil War ended and the Thirteenth Amendment abolished slavery, there were declarations that the United States had moved beyond race. Indeed, the Supreme Court made such a pronouncement in 1883 in the *Civil Rights Cases*.<sup>24</sup> In invalidating a federal law that prohibited racial discrimination by

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21. *Id.* at 310.

22. *Id.* at 311–14.

23. See *infra* notes 30–31, 35–36 and accompanying text (discussing the post-racial perspective advanced in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), and *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

24. 109 U.S. 3 (1883).



places of public accommodation, the Court proclaimed:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.<sup>25</sup>

Just eighteen years after the end of slavery, and despite abundant evidence of the continuing significance of race and racism, the Supreme Court was ready to declare that U.S. society was ostensibly post-racial and that there was no need for legislative action to combat racial discrimination.<sup>26</sup>

This approach was evident again a short time later in the infamous case of *Plessy v. Ferguson*, where the Court upheld a Louisiana law requiring racially segregated railroad cars.<sup>27</sup> As was the case with the *Civil Rights Cases*, the Justices were no doubt aware that laws mandating racial segregation were based upon the presumed inferiority of certain racial groups. Yet, instead of acknowledging this reality, the Court embraced a form of post-race-like reasoning, stating:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race

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25. *Id.* at 25.

26. In the strictest sense, one could argue that the majority opinion in the *Civil Rights Cases* was not the dawn of the Court's earliest commitment to post-racialism because Justice Bradley attempted to distinguish between slavery and race or color discrimination. For instance, the Court declared that "[t]he [T]hirteenth [A]mendment has respect not to distinctions of race, or class, or color, but to slavery." *Id.* at 24. With regard to "badges and incidents" of slavery, the Court found: "Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the [T]hirteenth [A]mendment (which merely abolishes slavery) . . ." *Id.* at 20, 25; see also Harris, *supra* note 11, at 1961 ("The decision in the *Civil Rights Cases* thus separated 'slavery' from 'race discrimination' and interpreted 'slavery' narrowly, reducing the Thirteenth Amendment to a rarely used provision.") (footnote omitted). The idea that one could separate the institution of slavery from the enterprise of racial discrimination seems misguided. The principal justification for slavery was that it was practiced upon a race deemed socially valueless. The overlap between supposed inferior racial status and the propriety of slavery is demonstrated in the *Dred Scott* case, where the Court noted that blacks "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations." *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856). The explicit message of Bradley's opinion in the *Civil Rights Cases* is that, eighteen years post-slavery, the institution and its effects no longer justified legal protections for former slaves. That rhetoric is completely consistent with tenets of modern post-racial ideology.

27. 163 U.S. 537, 550–51 (1896).

should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races.<sup>28</sup>

Through this sleight of hand (or rather of pen), the Court took a law that was the very embodiment of racism and race-conscious decision making and declared it to be post-racial. The Court reasoned that laws mandating segregation cannot result from white racism, presumably because race has no meaning to whites. Rather, if these laws were perceived as racist, it was only because blacks chose to view them that way. This move was post-race-like in at least two ways. First, the Court conveniently eliminated white racism as a causal variable and cause for concern. Second, the Court condoned state-enforced racial segregation so long as it was wrapped in the surreal message that race did not matter—that enforcing racial segregation was not akin to perpetuating an unconstitutional racial hierarchy.<sup>29</sup>

The impulse to declare society post-race has surfaced repeatedly in U.S. constitutional jurisprudence. Most recently, it is found in judicial assertions that the Equal Protection Clause requires colorblindness and bars any effort at race-based remedies for discrimination and segregation. For example, in his opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, Chief Justice John Roberts proclaimed, “the way ‘to achieve a system of determining admission to the public schools on a nonracial basis’ is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>30</sup> As Professor John Powell has noted, statements like this, which are frequently made by post-

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28. *Id.* at 551.

29. See *supra* notes 6, 11, 26 (it is this difference without disadvantage approach that allows the Court to minimize the salience of race in *Plessy*-era cases). Although *Plessy* was ultimately overturned, the question of whether racial difference (in other words, treating racial groups differently) is tantamount to unconstitutional race discrimination has been a recurring and highly contested issue within constitutional jurisprudence. It was this idea that proponents of race-based affirmative action used in their unsuccessful defense of policies favoring minorities that were claimed to be “benign” or “remedial.” See *Croson*, 488 U.S. at 493 (rejecting the government’s claim that some lesser form of judicial review should apply to race-based measures that are benign or remedial). Although the Court has seemingly rejected the difference-without-disadvantage approach in affirmative action cases, it has embraced this approach in other contexts, especially in cases that rely heavily on racially disparate outcomes. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292–97 (1987) (finding state discriminatory intent necessary for a violation of the Equal Protection Clause and rejecting statistical evidence alone of a racially disparate impact in the administration of the death penalty as evidence of discriminatory intent). For a claim that the *Plessy* Court’s commitment to formal rather than substantive equality remains in the Court’s current equal protection jurisprudence, see Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in *CONSTITUTIONAL LAW STORIES* 181, 182 (Michael C. Dorf ed., 2004).

30. 551 U.S. 701, 748 (2007) (citation omitted).



racialists, espouse a “false universalism”—a belief that every person is equal and requires no state-provided advantage.<sup>31</sup> This type of reasoning allows jurists to equate the use of race to achieve desegregation with the use of race to perpetuate subordination.<sup>32</sup>

Both psychological and policy reasons drive the strong impulse to declare U.S. society post-racial. Long ago, Alexis de Tocqueville identified race as the tragic flaw upon which American society was built.<sup>33</sup> In a nation where slavery flourished for the country’s first seventy-eight years and where Jim Crow governed for almost the next century, racism is a profound national embarrassment. Declaring the country to be beyond racism is a huge relief. It is a mark of how much Americans have progressed, individually and collectively. Psychologically, post-racialism allows contemporary Americans to feel self-satisfied and even morally superior to our predecessors. It allows us to believe that we live in an enlightened and egalitarian society unlike that of the past.

At the same time, being post-racial eliminates the need for policies that address the continuing legacy of America’s racist past. In the *Civil Rights Cases* in 1883, the Court declared America to be post-racial in order to explain why a law prohibiting private race discrimination was unnecessary.<sup>34</sup> In contemporary society, being post-racial means that there is no longer a need for affirmative action or other race-based remedies. If society is post-racial, then race-based remedies are undesirable as a lingering remnant of less enlightened times. Affirmative action programs or other race-conscious remedies are, by definition, inconsistent with a post-racial “reality.”

Even when the Supreme Court upheld affirmative action in *Grutter v. Bollinger*, several Justices felt obliged, quite gratuitously it seems, to discuss when America can stop engaging in race-conscious solutions and be post-racial.<sup>35</sup> The four dissenting Justices maintained that such a result should happen immediately, but Justice O’Connor, writing for the majority, said: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>36</sup>

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31. john a. powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 791 (2008).

32. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (Thomas, J., concurring), discussed *infra* note 164.

33. ALEXIS DE TOCQUEVILLE, *The Present and Probable Future Condition of the Three Races That Inhabit the Territory of the United States*, in DEMOCRACY IN AMERICA 331, 331–81 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1991) (1835).

34. See *supra* notes 24–26 and accompanying text.

35. 539 U.S. 306, 343 (2003).

36. *Id.* It is, of course, unclear whether Justice O’Connor intended to create a firm twenty-five-year cutoff for the consideration of race in college admissions or whether she was merely articulating a post-racial aspiration. Justice Thomas’s opinion appears to have adopted the former position. See *id.* at 377 (Thomas, J., concurring in part and dissenting in part) (“I therefore can understand the imposition of a [twenty-five]-year time limit only as a holding that the deference the Court pays to the Law School’s educational judgments and refusal to change its admissions policies will itself expire.”). At least one study related to Justice O’Connor’s prediction in *Grutter* suggests her timeframe was far too hopeful. See Alan Krueger et al., *Race, Income, and College in 25 Years: Evaluating Justice O’Connor’s*

Declaring U.S. society to be post-racial allows opponents of race-based remedies and programs to seem noble rather than racist. Implicitly, a post-racial society is seen as something to be prized. By claiming that American society is post-racial, it is possible to oppose race-based approaches without seeming regressive. It allows those who oppose affirmative action or the continuation of race-based remedies, like section five of the Voting Rights Act, to take the moral high ground; they are the ones who have moved on to a new, more enlightened era, while those who are trying to continue race-conscious remedies are mired in the past.

During the Vietnam War, Senator George Aiken said that the United States should declare victory and withdraw from Vietnam.<sup>37</sup> Likewise, claiming America to be post-racial is a way of declaring victory over all of the problems that are the continuing legacies of America's racist past. To be sure, the psychological and political impulses to be post-racial are mutually reinforcing. Many Americans are tired of having to deal with race and embracing post-racialism frees at least white Americans from this "burden." Proponents of the latter view maintain that if racial minorities want to continue to talk in terms of race, that is their issue. In other words, the problem is that people of color cannot let go of the past and want to continue to use past racism as an excuse, a scapegoat for their contemporary problems. This reasoning is, of course, eerily similar to the Court's observation in *Plessy v. Ferguson* that if segregation was a stamp of racial inferiority, it was only because blacks chose to see it that way.<sup>38</sup> Just as the Court's post-racial analysis in *Plessy* blamed blacks for feeling inferior, the modern post-racial ideology argues that racial difference continues to be an issue only because blacks (and other racial minorities) will not let go of race.

Despite the myriad life outcomes that are shaped by race, the United States appears to be in a state of racial fatigue.<sup>39</sup> Ongoing racial inequality in society seems intractable and defies easy solutions. Post-racialism makes it unnecessary to focus on the problems. Being post-racial feels good and ends the need for laws and policies that deal with race. It is hardly surprising then that the first

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*Conjecture*, 8 AM. L. & ECON. REV. 282 (2006) (claiming that, even without continuing bias, the legacy of racial discrimination in this country has produced income and educational gaps that are likely to limit the number of blacks at selective institutions of higher education in twenty-five years if race-neutral selection is used). More generally, at least two legal scholars have surmised that race will remain salient long after the prediction from *Grutter* suggests. Robert S. Chang & Jerome M. Culp, Jr., *Business as Usual? Brown and the Continuing Conundrum of Race in America*, 2004 U. ILL. L. REV. 1181, 1182 (writing on the occasion of the fiftieth anniversary of the *Brown* decision, they claimed, "[f]rom our findings, we believe that race will continue to have an unfortunate salience for racial minorities with regard to opportunity and outcome and that the promises of *Brown* will remain unfulfilled on *Brown's* hundredth anniversary . . .").

37. Albin Krebs, *George Aiken, Longtime Senator and G.O.P. Maverick, Dies at 92*, N.Y. TIMES, Nov. 20, 1984, at B10.

38. See *supra* notes 27–28 and accompanying text.

39. See George F. Will, *Misreading Obama's Identity*, WASH. POST, Dec. 30, 2007, at B7 (describing racial fatigue as the "unbearable boredom occasioned by today's stale politics generally and by the perfunctory theatrics of race especially").

declarations of America as a post-racial society occurred almost as soon as the Civil War ended. It is equally unsurprising that post-racial ideas regained traction soon after the decline of the Civil Rights movement of the 1960s. The lesson seems to be that moments of heightened racial awareness or racial conflict are inevitably followed by periods of denial.

## II. WHY THE PROMISE OF POST-RACIALISM IS STILL PREMATURE

Contemporary post-racialism seems to mean different things to different people. For some, it appears to be the fulfillment of colorblindness, a concept that dates back at least to Justice Harlan's dissent in *Plessy v. Ferguson*<sup>40</sup> and that has served as the poster child for conservative Supreme Court Justices in recent decades.<sup>41</sup> Colorblindness is premised on the belief that race—viewed largely as skin color or phenotype—lacks meaning in the sense that racial groups are not genetically wired to have certain moral, behavioral, or intellectual proclivities. Because race is irrelevant, proponents of colorblindness argue that we should not notice racial differences. Rather, we should view individuals as individuals and treat everyone the same.<sup>42</sup> To be sure, minimizing the significance of race is in many ways a laudable goal. The problem with post-race ideologies is that they require, in our retreat from unfair racial categorization, that we also ignore the hardened consequences of having used racial categories. To allow such a view of equality to guide equal protection analysis ignores the continuing significance of our horribly racist past.

For others, post-racialism appears to be the fulfillment of color-consciousness—a theory that gained traction in the 1980s in response to colorblindness. While acknowledging the irrelevancy of phenotypical differences among racial groups, advocates of color-consciousness point to the significance of race as a social construction.<sup>43</sup> They argue that even if skin-color differences lack biologi-

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40. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

41. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (plurality opinion by Chief Justice Roberts); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); *id.* at 240 (Thomas, J., concurring).

42. Even if individuals cannot be colorblind, advocates assert that the law must be. Colorblindness and its connection to post-racialism is discussed *infra* Part III.C.

43. This simple social construction point borders on being regarded as a truism. See, e.g., IAN F. HANEY LÓPEZ, *WHITE BY LAW* 15 (1996) (“Race is not . . . simply a matter of physical appearance and ancestry. . . . [I]t is primarily a function of the meaning given to these.”). As the following commentary attests, although race is neither truly biologically or scientifically significant, this does not weaken the power of the construction:

This leads almost all—including me—to conclude that when we refer to race or reify race, we are referring to the *social construction* of race rather than a biologically constructed difference.

As a result, I start with the assumption that race and the “one drop of blood” rule are not based on any established scientific or biological definition. Of course, that does not mean race has no meaning or power in our society. Quite the contrary, race is an intractable force in American society touching every facet of day-to-day American life—often affecting where one goes to school, the job opportunities presented, who one marries, where one lives, the

cal significance, society has attached meaning to these differences, with the result being pervasive racial inequality. Because of the latter, proponents of color-consciousness maintain that in order to get beyond the effects of racism, we must acknowledge the ways in which people have been differentially situated because of race. In this sense, color-consciousness acts as a remedial device—a mechanism to correct inequality resulting from historic and contemporary racism. Color-consciousness, however, also has an aspirational dimension, at least for some. Instead of a melting pot, in which racial differences blend together and become unseen or invisible, some advocates of color-consciousness envision a world in which racial differences are acknowledged but are not assigned a stereotypically negative meaning—a world in which we celebrate racial diversity instead of using it as a means for perpetuating hierarchy.<sup>44</sup>

Post-racialism melds aspects of both colorblindness and color-consciousness, which may explain its cross-ideological appeal. To some proponents of a post-racial America, Americans have become largely colorblind.<sup>45</sup> Because a majority of Americans no longer see race, we are no longer a racist society. Any remaining racism is limited to a few isolated bigots or radical fringe groups. Importantly, for this group, colorblindness is no longer an aspiration, but a reality. For others, however, post-racialism is not premised on colorblindness.<sup>46</sup> Americans still see race, but only in a positive sense. These post-racialists are able to acknowledge race, and simultaneously to assert that it is of no consequence except when we choose to celebrate it or to use it as evidence that America has overcome her racist past. Interestingly, this view strips color-consciousness of its power as a progressive tool because it assumes the United States has moved beyond racism, and thus there is no longer a justification for race-conscious remedies such as affirmative action.

Whether premised on colorblindness or color-consciousness, at its core,

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health care one receives, and even where one is interred following death. Race, in other words, continues to matter in our society, whether its definitional base is scientific or not. In fact, race has become a more powerful factor in American society because of its social construction. In sum, race, albeit socially constructed, continues to matter dearly in American society.

Alex M. Johnson, Jr., *The Re-emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race*, 94 IOWA L. REV. 1547, 1561–63 (2009) (footnotes omitted); see also Howard Winant, *Racial Dualism at Century's End*, in *THE HOUSE THAT RACE BUILT* 87, 89–90 (Wahneema Lubiano ed., 1997) (criticizing contemporary racial categories as “North American designations” that are not “in any sense ‘true’ or original self-descriptions of the human groups they name” but still finding that the categories matter as a means of rendering the social world both intelligible and opaque).

44. See K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, in *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 55, 68–70 (Robert C. Post ed., 2001) (noting that normative stereotypes, which are central to the construction of race and gender identity, need not be a basis for disadvantaging public actions); Johnson, *supra* note 43, at 1587 (asserting that focusing on ethnicity rather than race allows individuals to benefit from identity categories while rejecting the historical “baggage” tied to preexisting racial categories).

45. See, e.g., Cho, *supra* note 4, at 1626–27 (describing the conservative embrace of post-racialism as tracking with a belief in colorblindness).

46. See *id.* at 1597–99.

post-racialism incorporates the belief that racism is largely a relic of the past. Because we are beyond race, or more importantly beyond racism, the law should not tolerate race-based decision making or the adoption of race-based remedies. Neither position is supportable. Indeed, as we show below through the examination of recent events and statistical data, both colorblind and color-conscious post-racialists ignore the ways in which racism has been ingrained in systems and structures—indeed, in the very infrastructure—of U.S. society.

#### A. RECENT EVENTS

Although post-racialism may be a panacea for those with racial fatigue, it also evinces a type of racial amnesia—a desire to forget that those marked by race neither asked for the designation nor can they escape its present day meanings and effects.<sup>47</sup> One need look no further than the race-related incidents that marred the ostensibly transcendent election of 2008 to understand how race is still deployed in a divisive manner within this country.<sup>48</sup> For those who mark the election as stark proof of the rise of post-racialism, post-election events call into question the reasonableness of proclaiming post-racialism as our present reality. As two of us cautioned in an earlier editorial commentary on the premature embrace of post-racialism,<sup>49</sup> each of the following recent incidents has included a racialized component that should encourage skepticism of post-

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47. As this Essay was being written, we were reminded that there are places in the United States where people—including those who are agents of the state—still subscribe to and act upon racist ideologies. See *Interracial Couple Denied License in La.*, USA TODAY, Oct. 16, 2009, at 3A (reporting that a Louisiana justice of the peace refused to issue a marriage license to interracial couples because of his concern for the children born of such relationships). Perhaps a post-racialist would claim that such views are aberrational. The problem is one cannot be sure of whether these views are truly rare or whether post-racialism seems so possible because people have typically learned not to voice obviously discriminatory beliefs. There is certainly evidence to suggest that people continue to make decisions based upon race without acknowledging it. See, e.g., Angela I. Onwuachi-Willig & Mario L. Barnes, *By Any Other Name? On Being “Regarded as” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (2005) (analyzing studies that showed people use proxies for race, such as African-sounding names, to discriminate in employment and housing).

48. See, e.g., Jeffrey M. Chemerinsky & Kimberly C. Kisabeth, *Tracing the Steps in a Historic Election*, 86 DENV. U. L. REV. 615, 616–19, 624–29 (2009); Cho, *supra* note 4; Camille A. Nelson, *Racial Paradox and Eclipse: Obama as a Balm for What Ails Us*, 86 DENV. U. L. REV. 743, 757–58 (2009); Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1 (2009); Angela Onwuachi-Willig & Osamudia James, *The Inclining Significance of Presidential Races*, 72 L. & CONTEMP. PROBLEMS (forthcoming 2010). Recently, it has been revealed that at least one U.S. Senator believed candidate Obama’s race—or at least his ability to manipulate it or perform it—would be a political asset. News reports of a newly released book, JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE: OBAMA AND THE CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME* (2010), refer to Senate Majority Leader Harry Reid as follows: “[he] believed that the country was ready to embrace a black presidential candidate, especially one such as Obama—a ‘light-skinned’ African American ‘with no Negro dialect, unless he wanted to have one . . . .’” See Chris Cillizza, *Majority Leader Reid Apologizes to Obama for 2008 Remarks*, WASHINGTONPOST.COM, Jan. 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/09/AR2010010902141.html>.

49. Jones & Barnes, *supra* note 5.

racialism: (1) the Birther Movement, which challenged President Obama's place of birth, citizenship, and right to the presidency;<sup>50</sup> (2) the series of town hall meetings in the summer of 2009 that were loaded with a level of vitriol that seemed to go beyond mere opposition to healthcare reform;<sup>51</sup> (3) the deployment of race in an attempt to block the nomination of U.S. Supreme Court

50. We wrote of the Birther Movement:

Birthers claim Obama was not born in the U.S. and therefore is not lawfully president. A subtext to the Birthers' argument—were it true—is that because Obama has not been naturalized, not only is he *not* a U.S. citizen, he is not even entitled to be in this country. . . . To be sure, the Birthers' claims are unlikely to gain traction given that Hawaii has released a birth certificate showing that the president was in fact born on Oahu on Aug. 4, 1961 . . . . Could it be, however, that the Birthers' real goal is to undermine Obama's leadership by playing upon a racist stereotype—one that is usually leveled at Asian-Americans—that the president is foreign? For example, defining Japanese-American citizens as foreign and presumptively disloyal contributed to the World War II internment challenged in the 1944 case *Korematsu v. United States*. More recently, legal scholars . . . have pointed out a similar process being deployed against Arab-Americans who have been "racialized" as terrorists since Sept. 11, 2001.

*Id.* at 8. For discussions of the racialization of Arab-Americans and Asian-Americans as foreign, see Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 3 (2002) (alleging that "racialized presumptions of 'Oriental' foreignness and disloyalty . . . have consistently influenced Asian American legal history"); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Adrien Katherine Wing, *Civil Rights in the Post 9/11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 723 (2003) (arguing that although "Arabs and Muslims are often stereotyped as dangerous, evil, sneaky, primitive, and untrustworthy, much as Blacks are, the criminality has a twist—they are considered potential or actual terrorists").

51. In discussing the town hall meetings we observed:

Unlike the Birther Movement, whose reliance on the significance of race is not even thinly veiled, understanding what has been transpiring at congressional town hall meetings across the country is more complicated. Clearly, some of the disruptive behavior has been carefully orchestrated by and to protect the interests of private health insurers. Undoubtedly, some of the vitriol is a reflection of fears fueled by rumors of "death panels" and other misinformation. And some of the passion is likely caused by uncertainty concerning the effects of various proposals and legitimate questions about whether the country can bear the costs of a public option. But one cannot help but also wonder if health care reform is the real target of some of the angry hysteria. Strident cries to "take my country back" frequently sound more like frustrated anger over the fact that liberals are running the federal government, and this time there is added tension related to the fact that their leader is black. After all, does one really need to take a loaded gun to a town hall attended by the president if [the] purpose is merely to question the wisdom of health care reform?

To be sure, many maintain that the Birther Movement and the brouhahas at town hall meetings are perpetuated by a radical fringe not representative of average Americans' beliefs. However, the unwillingness of Republican legislators and mainstream conservative organizations to do more to squelch the zeal of Birthers' and the most virulent town hall protestors suggests that these ideas resonate with mainstream America more than many care to admit.

Jones & Barnes, *supra* note 5, at 8. Interestingly, former President Jimmy Carter also came to the conclusion that the opposition to healthcare was based, in part, upon the President's race. See Jeff Zeleny, *Obama Rejects Race as the Lead Cause of Criticism*, N.Y. TIMES, Sept. 19, 2009, at A11 (reporting former President Carter's claim that racism was the cause of opposition to the policies of the Obama administration and current President Obama's disagreement with the charge).



Justice Sotomayor;<sup>52</sup> and (4) the racial overtones surrounding the July 2009 confrontation between Professor Henry Louis “Skip” Gates and a Cambridge police officer.<sup>53</sup> We do not maintain that each event was wholly driven by or

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52. We noted of the Sotomayor nomination process:

[T]he Senate Judiciary Committee held confirmation hearings for Sotomayor, the first Latina nominee to the U.S. Supreme Court. . . . Conservatives . . . engaged in grandstanding that was racial and political in nature. In their efforts to defeat her nomination, Senate Republicans seized on Sotomayor’s singular comment from a speech in which she espoused the comparative benefits of being a wise Latina judge. What was alarming about the senators’ questions was their insinuation, ostensibly based on Sotomayor’s comment, that nominees of color, because of their race, are incapable of being impartial. The hearings were a blazing display of one of the hallmarks of the unidirectional application of the concept of race—that is, the privilege of white males to ignore that they have a race and that their racial experiences shape who they are and how they view the world. . . . One of the privileges of whiteness is the imposition of colorblindness as the only acceptable framework to discuss race, even as people of color deal with the experience of being marked by racial difference on a daily basis. To have the mere mention of that experience be equated with bias in favor of one’s own minority group is another form of racialized unfairness.

Jones & Barnes, *supra* note 5, at 8. Ironically, the nomination of Justice Sotomayor was described as the President backtracking on the post-race idea that he signaled would guide his administration. See Peter Baker, *Court Choice Pushes Issue of ‘Identity Politics’ Back to Forefront*, N.Y. TIMES, May 31, 2009, at 20 (arguing that Obama, the post-racial symbol, had returned to identity politics by nominating Judge Sotomayor); Shelby Steele, *Sotomayor and the Politics of Race*, WALL ST. J., June 8, 2009, at A17 (claiming “President Obama’s nomination of Sonia Sotomayor for the Supreme Court points to a dilemma that will likely plague his presidency: How does a ‘post-racialist’ president play identity politics?”); see also Ogletree, *supra* note 48, at 38 (alleging that the confirmation process was steeped in racial politics and quoting President Obama’s assertion that at the time of her nomination, Justice Sotomayor was the most qualified justice to be considered since Thurgood Marshall).

53. Finally, the Gates arrest and the fallout from the President’s comments provided the most significant example of post-election racial relevancy. With regard to the incident we asserted:

Few will forget the arrest of Harvard professor Henry Louis “Skip” Gates by Sgt. James Crowley, a Cambridge police officer, after a neighbor reported what she thought was a break-in at Gates’ home. When questioned about the incident during a primetime news conference on health care, Obama said, “the Cambridge police acted stupidly in arresting someone when there was already proof they were in their own home.” For days, the national conversation on health care was derailed as the nation debated Obama’s statement and whether the president was a racist. For some people, Obama’s comment seemed to confirm what they had suspected all along—that beneath the veneer of mainstream acceptability, Obama was just another black man who could not be trusted to protect the interest of all citizens. Might this explain why Obama mostly avoided discussions of race during the election? To speak of race, to identify with a race, means you are racist? This reading of race is devoid of history and context. Much like the *Civil Rights Cases*, it ignores the country’s history of racial oppression and the slow progression toward full racial inclusion. One need only look to the races of the 110 U.S. Supreme Court justices before Sotomayor and the 43 U.S. presidents before Obama, to see that race has mattered.

More important perhaps than the nation’s reaction to Obama’s observation was its response to the question of whether Gates was racially profiled. No one other than Gates and Crowley were present, and the two men initially had very different accounts of what occurred. Yet, Americans seemed split over whether the arrest was racially motivated. The popular post-race understanding of Gates’ arrest was that it was an isolated incident, a misunderstanding that should not be given too much weight. . . . To reach a firm conclusion without all the facts is, of course, problematic. But equally troubling is the presumption, fueled by a post-race ideology, that race was not involved. This presumption is counter to the deeply troubled history between

necessarily involved some form of overt racial discrimination. We assert that it would be ahistorical and acontextual to ignore the racialized discourse surrounding each episode. Dismissing these overtones would endow post-racialism with the sort of license that has historically been afforded to colorblindness—to deny the presence of race even when one should not. It is this vantage point that allows fair-minded and reasonable individuals, who may have a real desire to end racial discrimination and animus, to ignore the often disparate life circumstances of many people of color in this country.

#### B. STATISTICAL DATA

While each of the foregoing incidents demonstrates how racial considerations still permeate our societal interactions, they fail to address one of the most significant problems with the current post-race moment: post-racialism places undue emphasis on stories of individual success, and does not adequately account for the disparate conditions under which many people of color struggle.<sup>54</sup> We do not wish to belabor this point, but many minorities compare unfavorably to whites along most meaningful measures of economic and social success. Over the years, a number of scholars have analyzed the myriad sources and consequences of these disparate conditions, especially for blacks.<sup>55</sup> Here, we reproduce current (non-exhaustive) statistics for a number of critical life categories to demonstrate that if Americans care about the obstacles racial minorities encounter within the most significant metrics of life, then it seems implausible that America would seriously proclaim a victory over racism.<sup>56</sup>

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law enforcement and people of color in this country. . . . The race-neutral explanation for the Gates incident ignores this, as well as the instances of racial profiling recounted by both Harvard students and professors in recent years, and the disproportionate number of people of color incarcerated in this country.

Jones & Barnes, *supra* note 5, at 8.

54. See ROY L. BROOKS, *RACIAL JUSTICE IN THE AGE OF OBAMA* xii–xiv (2009); Mario L. Barnes, *Reflections on a Dream World: Race, Post-Race and the Question of Making It Over*, 11 *BERKELEY J. AFR.-AM. L. & POL'Y* 6 (2009) (suggesting that the significance of race should be measured as a function of the life circumstances of the largest portion of disenfranchised minorities, rather than singular examples of individual success).

55. See, e.g., ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* 106–09 (1992) (presenting statistics which suggest that “poor African Americans live at the low end of the American dream”); MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003) (in various chapters discussing racial disparities in education, wealth accumulation, and treatment within the criminal justice system); CHRISTOPHER EDLEY, JR., *NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES* 41–73 (1996) (reviewing social science evidence of racial inequality); ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992); see also Chang & Culp, *supra* note 36, at 1188–92 (presenting the “Inequality Cycle” to explain why, fifty years after the *Brown* decision, wealth accumulation had lagged for racial minorities due to systemic disparities in housing, education, family composition, employment and health care); Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 *CAMPBELL L. REV.* 503, 512–21 (2009) (presenting recent statistics illustrating racial disparities in education, health, housing, wealth, and within the criminal justice system).

56. In the sections that follow, we look at comparative data for racial groups in the areas of employment, wealth accumulation, education, and interactions within the criminal justice system,

## 1. Poverty

Although the poverty rate among African Americans is lower than it was in 1959,<sup>57</sup> and it is no longer more than three times the rate for whites,<sup>58</sup> the poverty rate continues to be much higher for people of color when compared to their white counterparts.<sup>59</sup> Indeed, at no point since 1959 has the poverty rate for African Americans been less than double the rate for whites.<sup>60</sup> In addition, although the poverty rate for African Americans has been below 30% since 1993, much of the improvement in the poverty rate occurred before 1970.<sup>61</sup>

To be sure, there are myriad causes of poverty.<sup>62</sup> Yet one narrative—that of personal irresponsibility—has dominated public discourse in recent decades: people of color are disproportionately poor because they have not worked hard enough and have become overly dependent upon welfare.<sup>63</sup> Although internal dynamics within communities of color—as in all communities—no doubt contribute to poverty, this narrative overlooks the ways in which structural forces have exacerbated poverty levels experienced by people of color. Critically, it ignores how the transfer of jobs to developing countries and the transition from a manufacturing to a service and technology-driven economy have resulted in a reduced number of jobs that pay a decent wage.<sup>64</sup> Although deindustrialization and globalization affect all Americans, their effects are particularly harsh on

including incarceration. We realize that not all minority groups are represented and will mainly discuss those groups with the largest disparities. The data are intended to be illustrative, with the hope that a “better picture of the world as it is will enable us to create the world as it should be.” Frank H. Wu, *Burning Shoes and the Spirit World: The Charade of Neutrality*, 44 HARV. C.R.-C.L.L. REV. 313, 313 (2009).

57. In 2008, the poverty rate for blacks was 24.7% and in 1959, the year for which data are first available, it was 55.1%. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, ANNUAL SOCIAL AND ECONOMIC SUPPLEMENTS, TABLE 2: POVERTY STATUS OF PEOPLE BY FAMILY RELATIONSHIP, RACE, AND HISPANIC ORIGIN: 1959 TO 2008 (2009), <http://www.census.gov/hhes/www/poverty/histpov/hstpov2.xls>.

58. In 2008, the poverty rate was 8.6% for non-Hispanic whites, 24.7% for blacks, 11.8% for Asians, and 23.2% for Hispanics. U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 13 (2009), <http://www.census.gov/prod/2009pubs/p60-236.pdf>; see also U.S. CENSUS BUREAU, *supra* note 57.

59. U.S. CENSUS BUREAU, *supra* note 58.

60. See U.S. CENSUS BUREAU, *supra* note 57.

61. In 1959, the poverty rate for African Americans was 55.1%. By 1970, it had decreased to 33.5%. Since 1970, the rate has declined further to the current rate of 24.7%. *Id.*

62. See BROOKS, *supra* note 54, at xiv (describing the resource disparity experienced by African Americans as resulting from external factors such as racism and internal factors such as behavior and values); HARRELL R. RODGERS, JR., POVERTY AMID PLENTY: A POLITICAL AND ECONOMIC ANALYSIS 41–58 (1979) (including racism among the four leading causes of poverty); James W. Fox Jr., *Citizenship, Poverty, and Federalism: 1787–1882*, 60 U. PITT. L. REV. 421, 541 (1999) (exploring the historical relationship between race and poverty).

63. The connection between race, culture, and poverty has sparked heated discussion in recent decades. See MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 16–43 (1989) (discussing the Moynihan Report and various culture of poverty theories); see also Peter Edelman, *Where Race Meets Class: The 21st Century Civil Rights Agenda*, 12 GEO. J. ON POVERTY L. & POL’Y 1, 2–7 (2005) (summarizing competing explanations for poverty among people of color).

64. See Edelman, *supra* note 63, at 4.

people of color, who tend to work in more vulnerable economic sectors and who tend to have less education and experience due, in part, to racism.<sup>65</sup>

The dominant narrative also overlooks that while these structural changes were occurring in the U.S. economy, economic inequality increased in the United States. Although our national income has more than doubled in real terms since the 1970s, the greatest portion of wealth accumulation occurred for the very wealthy.<sup>66</sup> Wages at the top of the economic hierarchy rose exponentially while wages at the bottom stagnated. In 1973, the median wage was \$12.53 an hour.<sup>67</sup> In 2003, the median wage was \$13.62.<sup>68</sup> As a result, in 2003, half of all full-time workers earned only a little more than they were making thirty years ago. While wages at the bottom were frozen, the salaries of CEOs at large companies rose at staggering rates. By one report, CEO salaries increased from 42 times the rate of entry-level workers in 1982 to approximately 411 times that rate in 2004.<sup>69</sup> A consequence is that today, income distribution is highly concentrated at the top, with the top 1% of the population earning more than 20% of all income and the top 10% earning almost half of all income.<sup>70</sup> Moreover, notwithstanding the rags-to-riches fairy tales that have captured the imaginations of so many Americans, the likelihood of moving from the bottom to the top is small. Researchers recently found that “42[%] of children born to parents in the bottom fifth of the income distribution remain in the bottom, while 39[%] born to parents in the top fifth remain at the top.”<sup>71</sup> These figures are “twice as high as would be expected by chance.”<sup>72</sup> Insofar as “[o]nly 6[%] of children born to parents with family income at the very bottom move to the

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65. See *infra* notes 104–115 and accompanying text.

66. Jeanne Sahadi, *Wealth Gap Widens*, CNN.COM, Aug. 29, 2006, [http://money.cnn.com/2006/08/29/news/economy/wealth\\_gap/](http://money.cnn.com/2006/08/29/news/economy/wealth_gap/) (analyzing Economic Policy Institute data which found, over a forty-year period beginning in the 1960s, that the top 1% of wealth-holding households increased their wealth from 125 times the median wealth in the U.S. to 190 times the median wealth, and that the top 20% of wealth-holding households increased during the same period from 15 times to 23 times overall median wealth).

67. Edelman, *supra* note 63, at 4.

68. *Id.*

69. These salaries were compared to the salaries of entry-level workers in the CEOs' companies. *Id.*; see also James D. Cox, *Fair Pay for Chief Executive Officers*, in *LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR 99*, 99–101 (Paul D. Carrington & Trina Jones eds., 2006) (detailing exorbitant pay increases among CEOs).

70. David Cay Johnston, *Income Gap is Widening, Data Shows*, N.Y. TIMES, Mar. 29, 2007, at C1 (reporting statistics based on 2005 data); see also JULIA B. ISAACS, ISABEL V. SAWHILL & RON S. HASKIN, *GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA* 27–29, 47–50 (2008), [http://economicmobility.org/assets/pdfs/PEW\\_EMP\\_GETTING\\_AHEAD\\_FULL.pdf](http://economicmobility.org/assets/pdfs/PEW_EMP_GETTING_AHEAD_FULL.pdf) (reporting that income and wealth inequality have been increasing since the 1970s and noting that the concentration of assets at the top of the income distribution has been growing since at least 1989).

71. ISAACS ET AL., *supra* note 70, at 4. The researchers also found that the stickiness at the top and bottom of the income distribution does not exist for children born into middle-income families, who “have roughly an equal shot at moving up or moving down and of ending up in a different income quintile than their parents.” *Id.*

72. *Id.*

very top,”<sup>73</sup> it seems the tale of economic prosperity that is so emblematic of the American dream is for many just that—a dream.<sup>74</sup> To the extent that slavery, Jim Crow racism, and segregation produced disproportionate levels of poverty among people of color, it seems plausible that the structural forces discussed above—which are so noticeably absent from our national discourse—would serve to reinforce those historic disparities.

## 2. Income and Wealth

While the median income level of African-American families has increased over the last two decades, it is still less than two-thirds that of white families.<sup>75</sup> Income, defined here as wages and other compensation paid for a person’s labor,<sup>76</sup> does not, however, adequately reflect the economic health of individuals or demographic groups. For the latter, one must look to wealth, or the value of a person’s material assets at a particular point in time, including cash, stocks, and real and personal property.<sup>77</sup> Importantly, wealth includes resources a person has accumulated during her lifetime as well as resources that have been inherited across generations.<sup>78</sup>

Analysis of wealth reveals a huge differential between whites and people of color in the United States. The median net worth of white households is more than ten times that of black households.<sup>79</sup> Moreover, “[m]iddle-class blacks earn seventy cents for every dollar earned by middle-class whites, but they possess only fifteen cents for every dollar of wealth held by middle-class whites.”<sup>80</sup> These statistics reveal the fallacy of relying on income data and evidence of a burgeoning black middle class to prove that racial barriers no longer exist. To the extent that middle-class blacks lack one of the pillars that provide stability to middle-class whites, the position of middle-class blacks is both precarious and fragile.

In addition, recent research indicates that, unlike whites, middle-class blacks have been unable to transfer their middle-class status to their children. Researchers found that the “majority of black children born to middle-income parents in the late 1960s have less family income than their parents did. In short, they have been downwardly mobile.”<sup>81</sup> The “failure of middle-income black families to

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73. *Id.* at 7.

74. *See id.* at 19.

75. U.S. CENSUS BUREAU, *supra* note 58, at 5.

76. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 30–31 (2d ed. 2006).

77. *See id.* at 30.

78. *Id.*

79. COUNCIL OF ECONOMIC ADVISORS, *ECONOMIC REPORT OF THE PRESIDENT* 316 tbl. B-33 (2003), [http://www.gpoaccess.gov/nsbudget/fy04/pdf/2003\\_erp.pdf](http://www.gpoaccess.gov/nsbudget/fy04/pdf/2003_erp.pdf); OLIVER & SHAPIRO, *supra* note 76, at 100. For a summary of studies examining wealth differentials overtime, see *id.* at 97–98; BROOKS, *supra* note 54, at 129–36.

80. OLIVER & SHAPIRO, *supra* note 76, at 7–8.

81. ISAACS ET AL., *supra* note 70, at 5.

pass their advantages on to their children does not suggest that racial economic gaps will close any time soon.”<sup>82</sup>

Wealth can obviously expand or limit the life opportunities of families. The critical question, however, is what explains the wealth disparity between whites and African Americans.<sup>83</sup> Importantly, researchers have shown that “[t]he answer is not simply that blacks have inferior remunerable human capital endowments—substandard education, jobs, and skills, for example—or do not display the characteristics most associated with higher income and wealth.”<sup>84</sup> Even when blacks and whites are on a par educationally and occupationally, a large wealth differential remains.<sup>85</sup> Rather than focusing exclusively on human capital explanations, researchers have also examined governmental and institutional policies, from the beginning of slavery to today, that have impaired the ability of African Americans to accumulate wealth. Such policies include local ordinances that barred blacks from owning land, holding certain jobs, and operating businesses in mainstream markets. Also included are welfare policies that discourage wealth accumulation; lending policies that devalue African-American neighborhoods and limit access to mortgages; and tax policies that provide greater discretionary income for middle- and upper-middle-class taxpayers.<sup>86</sup> The cumulative effect of these systemic forces has arguably cemented blacks at the bottom of the economic hierarchy.

### 3. Homeownership

One cannot examine contemporary inequities in homeownership rates without recalling the ways in which governmental, institutional, and private sector discrimination have affected the ability of people of color to acquire real estate. As Oliver and Shapiro note:

The use of land grants and mass low-priced sales of government lands created massive and unparalleled opportunities for Americans in the nineteenth century to secure title to land in the westward expansion. Likewise, government backing of millions of low-interest loans to returning soldiers and low-income families enabled American cities to suburbanize and their inhabitants to see tremendous home value growth after World War II. . . . [B]lack Americans for the most part were unable to secure the same degree of benefits from these government programs as whites were. Indeed, in many of these programs the government made explicit efforts to exclude blacks from participating . . .

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82. *Id.*

83. At least one scholar has asserted that for African Americans, it is not white racism, but this continuing resource disparity—“a paucity of financial, human, and social capital”—that embodies the contemporary race problem and constitutes the central question of racial justice in what he terms the “Age of Obama.” BROOKS, *supra* note 54, at xiv. As we have maintained throughout this Essay, others may simply refer to this as the post-race era.

84. OLIVER & SHAPIRO, *supra* note 76, at 8.

85. *Id.*

86. *Id.* at 4–5, 129–54.



or to limit their participation in ways that deeply affected their ability to gain the maximum benefits.<sup>87</sup>

Notwithstanding this history, from 1995 until about 2004, homeownership rates increased to an all-time high for all Americans.<sup>88</sup> Importantly, during this period, ownership rates grew more rapidly for people of color than for whites.<sup>89</sup> In 2008, however, the gap between whites and people of color remained substantial with ownership rates of 74.9% for whites, 59.1% for Asians, 47.5% for blacks, and 48.9% for Latinos.<sup>90</sup> At the same time, blacks and Latinos were twice as likely as whites to have subprime mortgages, even among borrowers with comparable incomes.<sup>91</sup> Not surprisingly, African Americans and Latinos have suffered the greatest declines in homeownership rates since the housing bust in 2007.<sup>92</sup> African Americans and Latinos are also more likely than whites to be turned down for mortgages.<sup>93</sup>

Various factors contribute to foreclosure rates and declining homeownership among people of color, including high unemployment, falling home prices, higher payments associated with subprime loans, and high debt-to-income ratios. In addition, people of color may have difficulty securing mortgages due to lower credit scores.<sup>94</sup> These reasons may have little or nothing to do with discrimination. At the same time, however, studies and anecdotal accounts demonstrate that people of color with adequate resources and good credit scores cannot obtain loans.<sup>95</sup> Indeed, high-income blacks have been denied mortgage loans more frequently than low-income whites, rendering the former more vulnerable to unscrupulous lenders.<sup>96</sup> Importantly, although some mortgage denials evidence contemporary redlining, rejection rates of people of color are not always based on geographical location.<sup>97</sup> All of the above suggests that institutional and individual biases continue to limit the ability of people of color to purchase homes in minority communities and elsewhere.

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87. *Id.* at 22.

88. Homeownership rates for all U.S. households peaked at 69% in 2004 before declining to 67.8% in 2008. U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER, HOUSING VACANCIES AND HOMEOWNERSHIP, TABLE 22 (2008), <http://www.census.gov/hhes/www/housing/hvs/annual08/ann08t22.xls>; John Leland, *Homeownership Losses Are Greatest Among Minorities*, *Report Finds*, N.Y. TIMES, May 13, 2009, at A16.

89. See U.S. CENSUS BUREAU, *supra* note 88.

90. RAKESH KOCHHAR, THROUGH BOOM AND BUST: MINORITIES, IMMIGRANTS AND HOMEOWNERSHIP 4–5 (2009), <http://pewhispanic.org/files/reports/109.pdf>.

91. In 2006, 17.5% of white home buyers had subprime loans, compared with 44.9% of Hispanics and 52.8% of blacks. Leland, *supra* note 88.

92. For white households, home ownership rates fell from 76.1% in 2004 to 74.9% in 2008. For African Americans, rates fell from 49.4% in 2004 to 47.5% in 2008. For native-born Latinos, rates fell from 56.2% in 2005 to 53.6% in 2008. *Id.*

93. In 2007, 26.1% of Latino, 30.4% of black, and 12.1% of white applicants were rejected. *Id.*

94. See *id.*

95. OLIVER & SHAPIRO, *supra* note 76, at 8, 139–49.

96. *Id.* at 140–49.

97. *Id.* at 139–49.

#### 4. Employment

Although some people of color have ascended to the ranks of the professional class,<sup>98</sup> African Americans and Latinos still disproportionately tend to occupy lower paying and lower status jobs.<sup>99</sup> In addition, their unemployment rates exceed that of whites.<sup>100</sup> The situation is most dire for African Americans, whose unemployment rate has been roughly double that of whites since the early 1970s. In addition, wages of people of color still lag behind those of white men. In 2006, black men earned 72.1% of white men's median annual earnings, Latino men earned 57.5%, black women earned 63.6%, and Latino women earned 51.7%.<sup>101</sup>

As with income and wealth disparities, various factors contribute to work-force stratification, including inferior access to quality education, lack of training and experience, and the deindustrialization of the U.S. economy. Although there are nondiscriminatory explanations for varying educational and skill levels among people of color, centuries of government-sanctioned discrimination certainly plays a role. This means that some African Americans are likely caught in a vicious cycle. Having been deliberately denied access to educational and professional training, these individuals have been disproportionately tracked into unskilled, lower paying, and menial occupations. Because they are forced to work longer hours for less pay, they lack both time and resources to pursue educational opportunities, which means they are effectively trapped into low-status work.

In addition to this historic cycle perpetuating itself, studies show that discriminatory bias against African Americans remains a serious problem, suggesting that part of the explanation for the economic subordination of some black Americans continues to relate to the discriminatory preferences of employers.<sup>102</sup> These studies are buttressed by the fact that the number of charges

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98. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES 2009, EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY 212, available at <http://www.bls.gov/cps/cpsaat11.pdf>; see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N EEO-1 SURVEY ANALYSIS (2007), <http://archive.eeoc.gov/stats/jobpat/2007/introduction.html>.

99. In 2008, African Americans and Latinos constituted 11% and 14%, respectively, of employed persons. Yet they represented only 8.3% and 7.1%, respectively, of employees in management and professional occupations. In contrast, they constituted 15.9% and 20.2% of employees in service occupations, 11.5% and 12.2% of employees in sales and office occupations, 6.9% and 25% of employees in natural resource, construction, and maintenance occupations, and 14.5% and 20.4% of employees in production, transportation, and material moving occupations. *Id.* at 209–14.

100. In 2007, the unemployment rate was 4.1% for non-Hispanic whites, 8.3% for blacks, 3.2% for Asians, and 5.6% for Hispanics or Latinos. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY AGE, SEX, AND RACE 200–02, available at <http://www.bls.gov/cps/tables.htm>.

101. U.S. CURRENT POPULATION SURVEY AND THE NAT'L COMM. ON PAY EQUITY, THE WAGE GAP, BY GENDER AND RACE, available at <http://www.infoplease.com/ipa/A0882775.html>.

102. See, e.g., ALFRED BLUMROSEN & RUTH BLUMROSEN, *Discrimination Against Blacks, in THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999*, at 111, 114 (2002), available at [http://www.eeo1.com/1999\\_nr.htm](http://www.eeo1.com/1999_nr.htm) (concluding that over one-fourth of establishments

alleging race discrimination filed with the EEOC has remained relatively consistent over the last decade.<sup>103</sup>

## 5. Education

A number of studies indicate that higher levels of educational attainment generally correlate to improved economic outcomes.<sup>104</sup> It should not be surprising, then, that blacks and Latinos who fare poorly compared to whites in terms of income accumulation also experience significant disparities in educational achievement. The high school dropout rate of blacks and Latinos is almost double that of whites.<sup>105</sup> College attendance and graduation rates also vary by race.<sup>106</sup>

One could argue that racially disparate outcomes might be expected given that there is no fundamental right to an education in this country, and that education funding is often tied to a local tax base<sup>107</sup>—a factor that exploits the

studied did not hire roughly proportionate numbers of blacks in at least one occupational category); Marianne Bertrand & Sendhil Mullainathan, *Are Emily And Greg More Employable Than Lakisha And Jamal? A Field Experiment On Labor Market Discrimination*, 94 AM. ECON. REV. 991, 997–98, (2004) (finding that resumes with white names resulted in 50% more callbacks than those with African-American names); see also Onwuachi-Willig & Barnes, *supra* note 47, at 1297–1305 (discussing the Bertrand and Mullainathan study and what its results suggest for employment discrimination laws).

103. From 1997 to 2008, the EEOC received between 26,000 and 34,000 charges alleging race discrimination per year, with a low of 26,740 in 2005, and a high of 33,937 in 2008. During that time period, EEOC findings of no reasonable cause remained roughly consistent at between 63.3% and 68.6%. The number of merit resolutions, however, increased from a low of 8.3% in 1997 to a high of 20.1% in 2006 with a 19.6% rate in 2008. The statistics are not broken out by racial category. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, RACE-BASED CHARGES: FY 1997–FY 2008, *available at* <http://archive.eeoc.gov/stats/race.html>.

104. See EDUCATION MATTERS: SELECTED ESSAYS BY ALAN B. KRUEGER xi–xiii (Krueger et al. eds., 2000) (discussing foundational studies proving a link between educational attainment and income).

105. According to the Center for Labor Market Studies at Northeastern University, approximately 6.2 million students in the United States between the ages of 16 and 24 in 2007 dropped out of high school. While the dropout rate for whites was 12.2%, it was 27.5% for Latinos and 21% for blacks. See *High School Dropout Crisis Continues in U.S., Study Says*, CNN.COM, May 5, 2004 <http://www.cnn.com/2009/US/05/05/dropout.rate.study/index.html>.

106. The U.S. Census Bureau educational attainment data for 2008 state that for both genders over the age of 18: of 182,714,000 non-Hispanic whites, 56,676,000 graduated high school, 35,759,000 attended some college (without graduating), and 33,159,000 received a bachelor’s degree; of 26,363,000 blacks, 9,213,000 graduated high school, 5,659,000 attended some college (without graduating), and 3,215,000 obtained bachelor’s degrees; of 30,286,000 Hispanics, 9,130,000 graduated high school, 4,684,000 attended some college (without graduating), and 2,539,000 received bachelor’s degrees; of 10,277,000 Asians, 1,965,000 graduated high school, 1,478,000 attended some college (without graduating), and 3,106,000 received bachelor’s degrees. U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE U.S.: 2008, *available at* <http://www.census.gov/population/www/socdemo/education/cps2008.html> (information on associates degrees was omitted).

107. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–35 (1972) (finding no fundamental right to education and that distinctions premised on socioeconomic class would receive only rational basis review); Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 L. & CONTEMP. PROBLEMS (forthcoming 2010) (challenging the Court’s decision in the *Rodriguez* case based on the claim that socioeconomic class currently functions in a substantially similar manner as suspect classifications, which receive heightened scrutiny by the courts).

interconnectedness of race, geography and poverty.<sup>108</sup> As such, it is not clear to what extent race versus other factors—including socioeconomic class or parental educational levels—contributes to disparities in educational attainment. Part of the educational attainment deficit, however, is likely tied to the “achievement gap.”<sup>109</sup> With this measure, critics have long claimed that both cultural bias and teacher expectations have hindered the performance of certain students of color.<sup>110</sup>

For the purposes of this Essay, we need not establish that racial disparities are proof of race-based discrimination,<sup>111</sup> especially in the area of education where affirmative action may still be practiced.<sup>112</sup> The point is that if we ignore these

108. See, e.g., Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the History of Segregation*, 5 OHIO ST. J. CRIM. L. 47, 66–68 (2007) (discussing discrimination, same-race preference, and violence as tools used to shape neighborhood racial composition); Steven W. Bender, *Knocked Down Again: An East L.A. Story on the Geography of Color and Colors*, 12 HARV. LATINO L. REV. 109, 132–33 (2009) (discussing how race shapes economic investment in neighborhoods); David A. Troutt, *Ghettos Revisited: Antimarkets, Consumption, and Empowerment*, 66 BROOK. L. REV. 1, 23–24 (2000) (examining the connection between education and wealth).

109. The term “achievement gap” describes statistically significant performance differences across identity categories such as race, gender, and class on standardized tests and other metrics of educational performance. Studies have tracked achievement gaps between whites and minorities on reading and math exams. See, e.g., NAT’L ASSESSMENT OF EDUC. PROGRESS (NAEP), REPORT, ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS 4, available at <http://nces.ed.gov/nationsreportcard/studies/gaps/> (documenting black–white achievement gaps); NAEP, THE NATION’S REPORT CARD: NAEP 2008 TRENDS IN ACADEMIC PROGRESS, available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2009479> (graphically representing the most recent data on reading and math gaps between blacks, whites, and Hispanics).

110. See CONTEMPORARY INTELLECTUAL ASSESSMENT: THEORIES, TESTS, AND ISSUES 242–43, 547–48 (Dawn P. Flanagan & Patti L. Harrison eds., 2d ed. 2005) (discussing studies of cultural loading—the degree to which knowledge or experience with mainstream U.S. culture is required by a test—and cultural bias in intelligence testing). For a discussion of lowered expectations based on race, see ELLIS COSE, COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSSESSED WORLD 50–67 (1997) (claiming that narratives of the intellectual inferiority of minorities have been deployed against various groups throughout U.S. history, adding to the low expectations partially responsible for their underperformance). Cose also claims that blacks in particular have likely internalized some of the noxious stereotypes related to their capabilities. *Id.* at 65. This claim implicates the work of Columbia University Provost and social scientist Claude Steele, who has, for years, been researching the ways in which black student performance is affected by what he terms “stereotype threat”—“the threat of being viewed through the lens of a negative stereotype, or the fear of doing something that would inadvertently confirm that stereotype.” Claude M. Steele, *Thin Ice: “Stereotype Threat” and Black College Students*, ATLANTIC, Aug. 1999, at 46.

111. Others, however, have sought to expose the ways in which unconscious bias and structural discrimination produce these disparities. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498–1528 (2005) (discussing studies demonstrating that subjects exhibited unconscious bias based on race); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (addressing the nature of institutional racism in judicial decision making); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329–44 (1987) (using Freudian psychoanalysis in constructing a model for unconscious racism).

112. See *supra* notes 35–36 and accompanying text.

disparities<sup>113</sup>—as recent Supreme Court cases<sup>114</sup> and voter initiatives<sup>115</sup> suggest we do—then these numbers will only worsen.

## 6. Criminal Justice Statistics

People of color have historically received unequal treatment within the U.S. criminal justice system.<sup>116</sup> Today, although black men and women make up approximately 12% of the U.S. population,<sup>117</sup> they make up approximately 40.2% and 32.6% of all male and female prisoners, respectively.<sup>118</sup> Hispanic men and women make up 20.3% and 16.1% of the U.S. prison populations, respectively.<sup>119</sup> Alarming, in recent years there have been more black men in prison than in college.<sup>120</sup> The prison rates, however, only detail what happens at the end of a trial process. Prosecutorial and other forms of discretion tend to favor whites far more than people of color at each critical juncture within the criminal justice process.<sup>121</sup>

113. Using the previously cited data from 2008 and computing the percentages for individuals within the population who are over 18 and are college graduates from the data, we find the following: 20% of adult whites have bachelor's degrees, as compared to 11.8% for blacks, 8.4% for Hispanics, and 30.2% for Asians. *US Census Bureau*, *supra* note 106.

114. *See* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (signaling the Court's aversion to allowing the consideration of race in plans to integrate primary and secondary schools); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (striking down the formulaic consideration of race in the University of Michigan undergraduate admissions).

115. In 2007, Michigan became another state to use a voter initiative to ban the consideration of race in state education and hiring decisions. *See* *Transcription: From Proposition 209 to Proposal 2: Examining the Effects of Anti-Affirmative Action Voter Initiatives*, 13 MICH. J. RACE & L. 461, 470 (2008).

116. *See* RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 76–134 (1997) (tracing the unequal treatment of blacks by state and federal criminal justice systems from slavery through the civil rights era); CYNTHIA LEE, *MURDER AND THE REASONABLE MAN* 155–72 (2003) (demonstrating how stereotypes are deployed against Asian and Latino victims in criminal trials); IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003) (describing the “legal violence” perpetrated against Mexican-American political activists during their trials in the late 1960s).

117. The most recent U.S. Census Bureau numbers for 2008 indicated that for individuals identifying themselves by just one race, whites comprised 74.3% of the population, while blacks were 12.3%, Hispanics were 15.1%, and Asians were 4.4%. U.S. CENSUS BUREAU, 2006–2008 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES: DATA PROFILE HIGHLIGHTS, available at <http://factfinder.census.gov/servlet/ACSSAFFacts>.

118. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISON INMATES AT MIDYEAR 2008: STATISTICAL TABLES 17* (2008). These statistics are for midyear 2008 and include persons incarcerated in local, state, and federal prisons.

119. *Id.* The Bureau of Justice does not keep separate statistics for Asians, American Indians, and multiple-raced persons, even though those populations are included in the total number of inmates.

120. Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and Its Impact on African American Men* 10 (2003), available at [http://www.justicepolicy.org/images/upload/02-09\\_REP\\_CellblocksClassrooms\\_BB-AC.pdf](http://www.justicepolicy.org/images/upload/02-09_REP_CellblocksClassrooms_BB-AC.pdf).

121. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007) (discussing the ways in which prosecutorial discretion contributes to racial disparities); Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 945–46 (2006) (asserting that stereotypes related to race are deployed against people of color in the narratives of criminal trials); Christian Halliburton, *Neither Separate Nor Equal: How Race-Sensitive Enforcement of Criminal Laws Threatens to Undo Brown v. Board of Education*, 3



There are likely complex and multiple reasons for these statistics. Some of what produces disparate life outcomes is personal, local, community-based, cultural, or perhaps environmental.<sup>122</sup> We submit, however, that one element producing these results is structural inequality experienced along racial lines.<sup>123</sup> If one agrees with this in the slightest, then it is ill-advised to adopt post-racialism, which generally rejects governmental and societal causes for disparate racial effects.

### III. RETHINKING EQUAL PROTECTION IN A POST-RACE ERA

In light of the foregoing, we now briefly consider the potential effects on constitutional jurisprudence of a fully implemented post-racial ideology.<sup>124</sup> In section A, we analyze disparate impact theory, which earlier Supreme Court cases have already whittled away. We argue that what remains of the theory may have to be substantially retooled to survive post-racialism. In section B, we turn to claims of intentional discrimination and consider what may happen to the few remaining lawful remedial programs should post-race become a jurisprudential reality. Finally, given the somewhat bleak future we anticipate, in section C we outline an approach to equal protection analysis that has the potential to provide some protection for racial minorities without offending post-racial values.

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SEATTLE J. SOC. JUST. 45, 46–47 (2004) (claiming that various forms of racism in the administration of criminal justice undermines *Brown*'s move away from separate but equal); *see also* Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 521–24 (1995) (analyzing racial bias in the administration of the death penalty); Tamara F. Lawson, "Whites Only Tree," *Hanging Nooses, No Crime?: Limiting the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 8 U. MD. L.J. RACE RELIGION GENDER & CLASS 123, 171–79 (2008) (asserting the racialized nature of the charging decisions in the Jena Six case).

122. *See, e.g.*, Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 L. & INEQ. 9, 18–23 (1985).

123. *See* EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 26 (2d ed. 2006) ("However, it is also true . . . that because people of color still experience *systemic* discrimination and remain appreciably behind whites in many important areas of life, their chances of catching up with whites are very slim."); EDWARD ROYCE, *POVERTY AND POWER: THE PROBLEM OF STRUCTURAL INEQUALITY* 13 (2009) (describing structural inequality in various ways, including that "poverty is a function of power, and people are poor because of inequities in government policy and labor market institutions"). For a comment on institutional racism, *see* SHIRLEY BETTER, *INSTITUTIONAL RACISM: A PRIMER ON THEORY AND STRATEGIES FOR SOCIAL CHANGE* 24 (2002) (describing racism as enduring not because of individual discrimination, but because race is a factor in a system that maintains privileges and disadvantages through institutional practices); *see also* Haney López, *supra* note 111.

124. This outcome is certainly possible in the near term. Four Justices (Scalia, Thomas, Roberts, and Alito) have voted essentially in favor of constitutional colorblindness, which works to achieve the post-race goal of eradicating race-based decision making. At present, these Justices lack a locked-in majority only because Justice Kennedy seems to allow for a very narrow set of circumstances where he believes race can still be lawfully considered. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy J., concurring); *see also* Rachel F. Moran, *Let Freedom Ring: Making Grutter Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475, 482–83 (2009).



## A. DISPARATE IMPACT THEORY

Disparate impact claims involve the “disproportionate exclusion of individuals on a protected basis, such as race or gender.”<sup>125</sup> Importantly, disparate impact theory minimizes the role of motivation; proof of discriminatory intent is not explicitly required, though it may be inferred from the disproportionate impact. The theory originated in *Griggs v. Duke Power Co.*, a statutory employment discrimination case, and is most frequently associated with Title VII’s statutory scheme.<sup>126</sup> Title VII, however, does not exhaust the universe of disparate impact claims. A number of federal and state statutes allow plaintiffs to bring these claims.<sup>127</sup> To the extent these statutes do not focus upon intent, they stand in opposition to post-racialism and the modern trend of requiring plaintiffs (and defendants in affirmative action cases) to identify with specificity the intentionally discriminatory acts infecting a particular decision-making process or system.<sup>128</sup> Impact statutes have provided substantial assistance because they acknowledge that race matters and that we might look to disparate outcomes to infer that actors (whether consciously or subconsciously) intend the likely consequences of their actions.<sup>129</sup> At the very least, impact claims allow us to presume that race was a consideration in practices that create racial disparities.

Disparate impact theory, however, is available only for statutory claims. In *Washington v. Davis*,<sup>130</sup> the U.S. Supreme Court determined that impact theory is essentially not applicable to constitutional claims.<sup>131</sup> The Court in *Davis* did not completely discount the importance of impact evidence; it merely held that constitutional claims, based on impact alone without proof of intent, would

125. Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108, 109 (1998).

126. The Court in *Griggs* required employers to articulate the employment-related purpose of any test producing disproportionately negative effects for groups protected under the statute. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). After *Griggs*, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k) (2006), plaintiffs may bring employment discrimination claims if they establish that a facially neutral criteria caused a statistically significant impact on a protected group and that the use of the criteria was not justified by business necessity.

127. See, e.g., Older Americans Act Amendments of 2006, 42 U.S.C. § 3030c-2(d) (2006) (“If the Assistant Secretary finds that there is a disparate impact upon low-income or minority older individuals or older individuals residing in rural areas in any State or region within the State regarding the provision of services, the Assistant Secretary shall take corrective action to assure that such services are provided to all older individuals without regard to the cost sharing criteria.”); CAL. GOV’T CODE § 12941 (“The Legislature . . . further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination.”); see also 305 ILL. COMP. STAT. 5/4-23 (although not providing a private cause of action, nonetheless requiring the state to track the disparate effects on racial and ethnic groups of various provisions of TANF).

128. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).

129. See *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (asserting that intentional discrimination and disparate impact are connected, “[f]or normally the actor is presumed to have intended the natural consequences of his deeds”).

130. *Id.*

131. *Id.* at 241–42; see also BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW 50–51 (1998).

receive rational basis review rather than strict scrutiny. This treatment of constitutional claims is post-race-like because it presumes that disparate outcomes are no longer caused by racism. It is, in short, another attack on the salience of race.

If post-racialism were pressed to its fullest extent, it is unlikely that even statutory impact cases would survive. If racism no longer exists (or is a rare occurrence), then disproportionate outcomes could not be typically or presumptively understood to be based on race. Given the outcome of a recent Title VII disparate impact case, *Ricci v. DeStefano*,<sup>132</sup> the imposition of a post-race presumption appears to be imminent. In *Ricci*, white and Hispanic firefighters sued city officials who refused to certify the results of two exams used to award promotions.<sup>133</sup> The results were not certified because they would have caused a disproportionate number of whites to be promoted in comparison to minority candidates.<sup>134</sup> At the time the city's decision was made, no minority candidates had sued alleging a disparate impact.<sup>135</sup> The district court and Second Circuit (with a panel that included then-Judge Sotomayor) ruled for the defendants.<sup>136</sup> The Supreme Court, however, in a five-to-four majority opinion written by Justice Kennedy, held that an employer cannot engage in "intentional discrimination" in an attempt to avoid a disparate impact unless there is strong evidence to suggest that it will be subject to disparate impact liability.<sup>137</sup>

There is a rhetorical problem with Justice Kennedy's contention that resolving even meritorious disparate impact claims results in intentional (reverse) discrimination.<sup>138</sup> His analysis begs the question of what constitutes discrimination and the meaning of equal protection. Are all considerations of race, regardless of context, now discriminatory? More disturbing to proponents of race-consciousness, however, was the concurring opinion of Justice Scalia, who wanted the Court to address whether the disparate impact provisions of Title VII were consistent with the Equal Protection Clause. According to Justice Scalia, "Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial

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132. 129 S. Ct. 2658 (2009).

133. *Id.* at 2671.

134. *Id.* at 2666–67.

135. *Id.* at 2671.

136. *See Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006); *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008).

137. *Ricci*, 129 S. Ct. at 2677.

138. We do not challenge the obvious truth that favoring one group may create disfavor for another group. We only contest the inference that all choices between groups should be viewed with equal skepticism. As John Hart Ely surmised over 30 years ago: "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and consequently, employing a stringent brand of review, are lacking." John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974).

decisionmaking is, as the Court explains, discriminatory.”<sup>139</sup>

Given the subtle, nuanced, and often unconscious ways in which discrimination is practiced, for years civil rights advocates sought to expand the areas in which impact could be used as proof of intent or as a substitute for intent.<sup>140</sup> Now—in the world of post-racial equal protection—it appears that these advocates may have to defend disparate impact claims from eradication.<sup>141</sup>

#### B. INTENTIONAL DISCRIMINATION AND AFFIRMATIVE ACTION

In three significant ways, the Supreme Court’s doctrinal approach to intentional discrimination cases already ignores how race operates. First, the cases that reject disparate impact theory for constitutional claims also require plaintiffs alleging intentional discrimination to prove that the government adopted a particular policy because of its negative racial effects, rather than in spite of these effects.<sup>142</sup> Second, where there is no direct evidence of racial animus, even overwhelming statistics supporting differential racial outcomes are treated as correlative rather than causative.<sup>143</sup> Finally, despite all of the scientific evidence that now exists to support the existence of unconscious bias,<sup>144</sup> the Court has not explicitly recognized this phenomenon as shaping race relations.

With this particular set of commitments in place, it is not clear that the Court could have ruled in favor of the plaintiffs in *Brown v. Board of Education*, which relied heavily on social science evidence to establish the link between

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139. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring). Justice Scalia’s rejection of impact data appears to be limited to the facts of the *Ricci* case. He does not seem to claim that disparate impact analysis is never helpful in uncovering racial animus. *See id.* (“It might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to ‘smoke out,’ as it were, disparate treatment. . . . Disparate impact is sometimes . . . a signal of something illicit, so a regulator might allow statistical disparities to play some role in the evidentiary process.” (citations omitted)). Others have claimed that disparate impact evidence is problematic in other ways. *See, e.g.*, Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006) (arguing that the theory was created to deal with past instances of discrimination, not as part of a coherent theory of equality, and that empirically it has been of limited success only in the area of challenging employer-written tests).

140. An expansion would include applying impact theory to constitutional claims, which was rejected in *Washington v. Davis*, 426 U.S. 229 (1976). Greater refinement of impact theory might also be helpful in evaluating employer defenses in impact cases. *See, e.g.*, Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 CAL. L. REV. 669 (2007) (asserting that business necessity in impact cases should turn on whether the employer engaged in pro- or anti-competitive practices).

141. Ignoring the disparate effects of policies on people of color may not be proof of racial animus, but perhaps it should still be regarded as an ill-advised form of “racially selective sympathy and indifference.” Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976) (defining the phrase as “the unconscious failure to extend to a minority the same recognition of humanity . . . given as a matter of course to one’s own group”).

142. *See McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); *Davis*, 426 U.S. at 245.

143. *See McCleskey*, 481 U.S. at 308.

144. *See supra* note 111; Anthony G. Greenwald & Linda Hamilton Krieger, *Symposium on Behavioral Realism: Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006) (discussing the results of tests of implicit association bias).

segregation and racial inferiority.<sup>145</sup> Additionally, with the present framework, it does not appear that the Court would need to adjust its philosophy much to be in line with post-racialism. In the area of affirmative action, only higher education remains a place where race can be legitimately considered—at least for twenty more years.<sup>146</sup> In employment and contracting, the Court has held that race can only be used to remedy the effects of past discrimination if the state actor in question can point to a particular discriminatory act or policy in the regulated area.<sup>147</sup> To some extent, this requirement is a pronouncement that today's citizens should not be punished for the racist deeds of their ancestors, no matter how longstanding the consequences of those deeds have proven to be.

Finally, one need look no further than Chief Justice Roberts's opinion in *Parents Involved*<sup>148</sup> to imagine the day when the Court will reject race-based remedies in all but the most egregious intentional discrimination cases. While diversity is currently an acceptable basis for considering race in higher education admissions, this could change. According to the Court in *Parent's Involved*, the diversity rationale approved in *Grutter* must be more than mere "racial balancing," and race can only be considered as part of a "broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'"<sup>149</sup> Because the Court appears hostile to expanding the use of the diversity rationale outside of higher education and because several sitting Justices seem to believe that almost any consideration of race by the state is harmful, the diversity rationale may be in serious jeopardy.<sup>150</sup> Rather than wait twenty years to decide that affirmative action is no longer warranted, the Court could apply preexisting limits within current compelling interest analysis more severely.<sup>151</sup> For example, to invalidate policies like that employed by the

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145. For a discussion of the use of social science evidence in *Brown*, see Malik Edwards, *Footnote Eleven for the New Millennium: Ecological Perspective Arguments in Support of Compelling Interest*, 31 SEATTLE U. L. REV. 891, 898–902 (2008). Remarkably, the Clark doll studies used in *Brown* were substantially recreated by a high school student in 2007, with results suggesting the self-esteem of black children is still deeply scarred by messages of racial inferiority. See Video: A Girl Like Me (2005), available at <http://video.google.com/videoplay?docid=1091431409617440489#>.

146. See *supra* notes 30–32, 35–36, 114 and accompanying text (discussing the limited affirmative action that remains after the decisions in *Grutter*, *Gratz*, and *Parents Involved*).

147. See *infra* notes 163–165 and accompanying text (discussing the demise of workplace affirmative action in the *Croson* and *Adarand* cases).

148. See *supra* note 30 and accompanying text.

149. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

150. See *supra* note 30 and accompanying text (Chief Justice Roberts stating in *Parents Involved* that to end racial discrimination the state must stop considering race); *infra* note 161 and accompanying text (Justice Scalia suggesting in his concurrence in *Adarand* that there is no benign consideration of race and that the U.S. government should recognize one race—the "American" race).

151. Satisfying the narrowly tailored prong of strict scrutiny already requires the state to prove that there was no race-neutral alternative to the race-conscious method it employed. See Kenneth L. Marcus, *Diversity and Race-Neutrality*, 103 NW. U. L. REV. COLLOQUY 163 (2008) (discussing the institutionalization of the race-neutral query in the *Wygant*, *Grutter*, *Adarand* and *Parents Involved* cases). It would be quite easy for the Court to use this criterion to reject race-conscious policies as there will always be some race-neutral means, however impractical or ineffective they may be. This is certainly true in the

University of Michigan Law School in *Grutter*, in a future case five Justices would only need to determine that affirmative action in higher education admissions no longer meets the requirement of “serious, good faith consideration of workable race-neutral alternatives.”<sup>152</sup> While small doctrinal shifts in the Court’s current equal protection jurisprudence could result in the de facto implementation of post-racialism, we next consider a version of equality analysis that seeks to redress the disparate life circumstances of many people of color without relying upon claims of racial saliency.

### C. THE WAY FORWARD

In a segregated society, or a society that had only recently emerged from segregation, colorblindness—the notion of treating people the same regardless of their race—was a powerful progressive tool. In a context where it was difficult to deny the salience of race, being blind to color meant ensuring that people of color were treated no worse than whites. Indeed, this was the original premise of formal equality. Although such an approach would not necessarily eradicate racial inequality, it was likely to produce better outcomes for people of color. It is arguably this proactive use of colorblindness that Justice Harlan was getting at in *Plessy v. Ferguson* when he stated, in dissent, “[b]ut in view of the [C]onstitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our [C]onstitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>153</sup> It is arguably this remedial use of colorblindness that inspired Dr. Martin Luther King to proclaim “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”<sup>154</sup> And it is arguably this use of colorblindness that caused President Kennedy to say, in June of 1963, that African Americans “have a right to expect that the law will be fair, that the Constitution will be color

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higher education context. See *id.* at 168–70 (noting that to preserve diversity where race-neutral alternatives (RNAs) are truly required, schools would need to articulate “specific, demonstrable educational benefits” of diversity and demonstrate that “race-conscious programs achieve those benefits more effectively than RNAs do”); RICHARD THOMPSON FORD, *THE RACE CARD* 249–55 (2008) (discussing the precariousness of the diversity rationale).

152. *Grutter*, 539 U.S. at 339.

153. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Importantly, Justice Harlan’s vision of colorblindness did not ignore the reality of racial differences. Indeed, in the text preceding this famous language, he explicitly states:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.

*Id.*

154. Dr. Martin Luther King, Jr., Address at the March on Washington: I Have A Dream (Aug. 28, 1963).

blind.”<sup>155</sup>

Colorblindness as a mechanism for progressive change, however, has been turned on its head. Instead of being used to challenge the status quo, today colorblindness is a means to entrench it.<sup>156</sup> Importantly, a key distinction between the old version of colorblindness and its current incarnation is that the former acknowledged the existence of racism and sought to respond to it. It had both a remedial and an aspirational component (a vision of a future where racial differences would lack significance). Yet, forty-six years after the formal end to de jure segregation, colorblindness is no longer treated as an aspiration, but rather as a presumptive reality: we are post-race.<sup>157</sup> A majority of Americans presumably no longer see race or operate based upon racism.<sup>158</sup> Racism is not the norm, and that which remains is limited to the random, isolated acts of bigots.<sup>159</sup>

This switch in the underlying premise of colorblindness has had pernicious consequences for legal doctrine and for those seeking to address racial inequality through the law.<sup>160</sup> As noted earlier, discrimination claims require proof of intent.<sup>161</sup> Yet advocates for racial equality find themselves in a bind when trying to establish intent because when the Supreme Court gutted disparate impact theory—at least for purposes of constitutional analysis—the Court simultaneously increased the showing required to recover in cases alleging intentional discrimination. In *Bakke*, Justice Powell concluded that societal discrimination

155. President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963).

156. See Haney López, *supra* note 5 (“Colorblindness is a form of racial jujitsu: co-opting the moral force of the civil rights movement, it uses that power to attack racial remediation and simultaneously to defend structural racism.”); Harris, *supra* note 11, at 1926 (“Yet, oddly enough, the language of ‘colorblindness’—once a ringing call for equality—is now seen in many progressive quarters as code language for the perpetuation of racial inequality.”); see also BONILLA-SILVA, *supra* note 123, at 3 (asserting that colorblindness is just another form of racist disposition: “Compared to Jim Crow racism, the ideology of color blindness seems like ‘racism lite.’ Instead of relying on name calling . . . color-blind racism otherizes softly . . .”); COSE, *supra* note 110, at 179–90 (discussing how many use beliefs about the decline of overt racism as a proxy for the idea that race no longer matters).

157. By contrast, Sumi Cho describes post-race as both consistent with and different from colorblindness. See Cho, *supra* note 4, at 1597–98 (“[T]he ideology of colorblindness shares many features and objectives with the ideology of post-racialism . . . post-racialism is yet distinct as a descriptive matter, in that it signals a racially transcendent event that authorizes the retreat from race. Colorblindness, in comparison, offers a largely normative claim for a retreat from race that is aspirational in nature.”).

158. Cheryl I. Harris & Devon W. Carbado, *Loot or Find: Fact or Frame?*, in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA 87, 91 (David Dante Troutt ed., 2006) (“Color blindness is a kind of metaframe that comprises . . . interwoven racial scripts: (1) because of *Brown v. Board of Education* and the civil rights reforms it inaugurated, racism is by and large a thing of the past . . .”).

159. Such a claim prevents discrimination from being understood as structural. See *id.* (“[W]hen racism does rear its ugly head, it is the product of misguided and irrational behavior on the part of self-declared racial bigots, who are few and far between . . .”).

160. In the colorblind and post-racial world, all racial classifications by the State are immediately suspect and presumptively invalid. See *id.* (“[R]acial consciousness—whether in the form of affirmative action or Jim Crow-like racism—should be treated with suspicion . . .”).

161. *Washington v. Davis*, 426 U.S. 229, 239–43 (1976).



was too amorphous a basis for governmental intervention and would presumably open the floodgates to discrimination claims.<sup>162</sup> A decade later, in *City of Richmond v. J.A. Croson Co.*, the Supreme Court held that in order to recover for intentional racial discrimination, plaintiffs must produce evidence of specifically identifiable instances of discrimination engaged in by the defendant.<sup>163</sup> Although statutory and constitutional claims have a different legal foundation, recent attacks on statutory disparate impact claims are fueled by the same impulse that is driving changes in equal protection jurisprudence—skepticism about the fundamental assumption that racism continues to be pervasive in the United States and that, absent a nondiscriminatory explanation, it is the likely cause of statistically significant disparities.

If, for the political and psychological reasons set forth in Part II, post-racialism puts into question this fundamental assumption, then what is the way forward for advocates of racial equality? We suggest that progressives might do well to heed the words of Justice Holmes with which we began this Essay and recognize that discrimination and equal protection are susceptible to varying interpretations depending upon time and place. In the past, advocates for racial justice proceeded largely based upon a compensatory justice theory; legal intervention was necessary to right the wrongs of the past. Aspirational colorblindness fit well within this paradigm. Importantly, as noted earlier, aspirational colorblindness did not ignore race and the pernicious effects of racism on particular classes; it sought to remedy it. Post-racial colorblindness, however, does not fit within a compensatory or remedial justice framework because its underlying premise is that there is nothing for which to compensate because racism is a thing of the past. Post-racial proponents thus chafe at the use of classes and classifications and at any recognition of distinctions among people, regardless of context and regardless of purpose. This is what allowed Justice Scalia to proclaim that

[t]o pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.<sup>164</sup>

Is it what allowed Justice Thomas to state that “there is a moral and constitutional equivalence . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of

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162. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978); *see also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (holding that the goal of alleviating the effects of societal discrimination by providing minority students with minority role models was insufficient justification for using race in determining teacher layoffs).

163. 488 U.S. 469, 505 (1989).

164. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

equality.”<sup>165</sup>

If we are to be considered one race—all subject to the same norms—perhaps one way to redress the inequality that leaps from anecdotal stories and statistical data is to shift the underlying premise of equality arguments from a compensatory to a distributive justice rationale.<sup>166</sup> Under a distributive justice theory of equal protection, the goal in the most basic sense would be to ensure that societal opportunities do not fall below a minimum threshold for all persons, regardless of how people come to be differently situated.<sup>167</sup> As two scholars have noted:

A just society should not allow people to be very poor or powerless. A purely distributive rationale is indifferent to how an individual's subordinate status came about—whether it is the result of happenstance, discrimination, or cultural maladaptation to postindustrial American society. Welfare programs such as Aid to Families with Dependent Children and Medicare are paradigmatic (non-group-based) distributive policies. A hiring or admissions program favoring the disabled is an example of an essentially distributive affirmative action policy. . . .

Distributive policies that seek to improve the present condition of individuals seldom aspire to be thoroughly egalitarian. They only prevent individuals from falling below some threshold, leaving a society with considerable variation in individual welfare.<sup>168</sup>

Arguments based upon distributive justice would not require that progressives ignore statistical disparities among groups. They would simply change the way in which equality advocates frame the discussion. If post-racialists mean what they say—if race is truly irrelevant—then glaring racial outcomes (regardless of their cause) would not be tolerated. Thus, plaintiffs would be allowed to rely upon disparate outcomes but without the implied accusation and psychological baggage that compensatory justice arguments seem to invoke.

To be sure, there are dangers to shifting to distributive justice principles and to untethering equality arguments from historical context. The latter makes challenges to disparate outcomes more vulnerable to “blame the victim” types

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165. *Id.* at 240 (Thomas, J., concurring) (citation omitted) (internal quotation marks omitted).

166. See LESLEY A. JACOBS, PURSUING EQUAL OPPORTUNITIES: THE THEORY AND PRACTICE OF EGALITARIAN JUSTICE 74 (2004) (“An egalitarian society must take responsibility for its particular design of advantages and disadvantages and the respects in which these track perceived natural differences . . . .”); CORNEL WEST, RACE MATTERS 64 (1993) (“Visionary progressives always push for substantive redistributive measures that make opportunities available to the have-nots and have-too-littles . . . .”).

167. See Brest, *supra* note 141, at 48–49 (discussing the theories of Owen Fiss, John Rawls and others which proclaim the moral permissibility of resource redistribution to racial and ethnic groups that are “substantially worse off than others” without regard to the cause of the disadvantage).

168. Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 867 (1995).

of responses.<sup>169</sup> In addition, it will not be easy (as the current national “discussion” of health care reform shows)<sup>170</sup> to form consensus about the ideal floor beneath which individuals and groups should not be allowed to fall. And there is something disingenuous and distasteful about not calling racism out for what it is—about buying into the myth that the United States is post-race.<sup>171</sup> But because that myth is successfully being touted as reality, perhaps progressives have little to lose as they are already swimming against the tide.

These are all complex issues through which progressives must work. It may be that, at the end of the day, equality advocates will decide that the risks of shifting theories outweigh the potential gains. All we are saying is that in the current context, with five members of the Supreme Court and many Americans believing that racism is largely an ancient relic, progressives must retool and think creatively about different approaches to racial justice. It was this sort of creative thinking—and the detangling of affirmative action from corrective justice principles—that led, at least in part, to the successful outcome in *Grutter v. Bollinger*.<sup>172</sup> As the debates leading up to that case demonstrated, the public seemed much more willing to accept affirmative action programs based on diversity than affirmative action based upon compensatory justice principles. As one of us noted at the time:

With their focus on corrective justice, traditional affirmative action programs appear more exclusive, evoking images of slavery and demanding that people acknowledge and assume responsibility for this country’s history of racial oppression (a responsibility that many people are loath to accept because they feel that they and their immediate ancestors have done nothing wrong). With this emphasis on the past, traditional affirmative action programs may arouse feelings of fatigue, guilt, defensiveness, and anger, and bring to mind concerns about racial preferences, quotas, merit, stigma, and reverse discrimination, among other things. Consequently, these programs are more difficult for some people to accept.

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169. See, e.g., BROOKS, *supra* note 54, at 24–27 (discussing what the author describes as the traditionalist view of wealth disparity, which claims that resource disparity results from internal flaws of minority group members); Harris & Carbado, *supra* note 158, at 92 (discussing how colorblindness constructs racial disadvantage: “[W]ere black people to engage in normatively appropriate cultural practices—work hard, attend school, avoid drugs, resist crime—they would transcend their current social status and become part of the truly advantaged.”).

170. See Richard Wolf & Susan Page, *Obama Battles the Chatter: As Town Hall Meetings Turn Ugly, He Fights Back*, USA TODAY, Aug. 8, 2009, at 1A.

171. See CHRISTOPHER J. METZLER, THE CONSTRUCTION AND REARTICULATION OF RACE IN A “POST-RACIAL AMERICA” 6 (2008) (“‘Post-racial’ is a moniker that represents an articulated vision of race steeped in rigid ideology, constrained by denial of historical realities and undermined by a need to move forward without acknowledging racism, exclusion, and oppression as continuing violations that impact all Americans, including Whites.”).

172. 539 U.S. 306 (2003).

In contrast, because diversity initiatives lack any remedial component, the imagery evoked by the term “diversity” is quite different. While corrective affirmative action looks at the past, diversity suggests a more forward-looking orientation. The word diversity may also appear to be more inclusive. For some people, diversity calls to mind a host of factors connoting difference, including class, race, gender, age, disability, geographical origin, sexual orientation, artistic talent, and athletic ability, among other things. Consequently, a wide range of persons can envision themselves as potential beneficiaries of such programs. Everyone can be a member of the choir, so to speak.<sup>173</sup>

To the extent that arguments based on distributive justice principles are more inclusive and less reliant upon a past that few want to remember, they may provide a source of relief for racial inequality—even in a country that professes to be post-race.

#### CONCLUSION

On June 11, 1963, in a radio and television address to the American people, President John F. Kennedy stated:

The Negro baby born in America today . . . has about one-half as much chance of completing a high school as a white baby born in the same place on the same day, one-third as much chance of completing college, one-third as much chance of becoming a professional man, twice as much chance of becoming unemployed, about one-seventh as much chance of earning \$10,000 a year, a life expectancy which is seven years shorter, and the prospects of earning only half as much.<sup>174</sup>

Fifteen years later, in *Regents of the University of California v. Bakke*, Justice Marshall wrote:

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male

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173. Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 174–75 (2005).

174. Kennedy, *supra* note 155.

who completes four years of college can expect a median annual income of merely \$110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers, and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.<sup>175</sup>

To be sure, much has changed in the United States since June 11, 1963, when hotels, restaurants, theatres, and retail stores refused to serve African Americans, and when military troops were required to ensure the orderly admission of African-American students to the University of Alabama. And much has changed since 1978, when the University of California at Davis sought to increase the enrollment of disadvantaged and minority students in its Medical School.<sup>176</sup> Due to the Civil Rights Act of 1964, places of public accommodation can no longer legally deny service to people of color.<sup>177</sup> In addition, because of *Brown v. Board of Education*<sup>178</sup> and the decades of litigation that followed, education has become more accessible for some. As a result, African Americans—who are approximately 12% of the population—constitute 4.6% of lawyers, 6.8% of judges, 6.2% of physicians and surgeons, 3.3% of dentists, and 5.2% of college and university professors.<sup>179</sup>

Although the United States has witnessed substantial progress, glaring evidence of racial inequality remains. Today, people of color tend to earn significantly less than their white counterparts;<sup>180</sup> they tend to be segregated into lower paying and lower status occupations;<sup>181</sup> they tend to be unemployed at a substantially higher rate than whites;<sup>182</sup> they are twice as likely to be impoverished as whites;<sup>183</sup> and they are much less likely to have access to adequate housing than whites.<sup>184</sup> For some people, however, the statistical data are insufficient to establish the continuing presence of racism. In 1963, when the United States was still a segregated society, the causal connection between racism and inequality could hardly be denied. But forty-seven years later, Americans seem increasingly skeptical about the influence of the past on the present. In this so-called post-race era, it appears that many Americans are inclined to believe that those who have not achieved the American dream have failed, not because of racism, but because of a lack of skill, inadequate motivation, and intergenerational pathologies within parts of the African-

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175. 438 U.S. 265, 395–96 (1978) (Marshall, J., dissenting and concurring).

176. *Id.* at 272.

177. 42 U.S.C. § 2000(a) (2006).

178. 347 U.S. 843 (1954).

179. BUREAU OF LABOR STATISTICS, *supra* note 98, at 209–11.

180. *See supra* notes 75–86 and accompanying text.

181. *See supra* notes 98–99 and accompanying text.

182. *See supra* notes 100–101 and accompanying text.

183. *See supra* notes 57–61 and accompanying text.

184. *See supra* notes 87–93 and accompanying text.

American community.<sup>185</sup> Data evidencing substantial improvement in the economic condition of some African Americans are used to buttress these claims. For example, the poverty rate for African Americans is down, and incomes are up.<sup>186</sup> In addition, African-American homeownership has increased markedly,<sup>187</sup> as has the percentage of African Americans among the middle class.<sup>188</sup> Claims based on the statistical data are underscored by the visibility of highly successful African-American athletes, entertainers, politicians, and businessmen.

In short, in 2009, some Americans feel that because some people of color have “made it,” racial barriers to opportunity have been eliminated. For this group, any remaining inequality is due largely to a lack of personal responsibility. As this Essay has demonstrated, this argument is flawed because although there has been racial progress, it is not as broad or as deep as post-racialists would like to assert. In addition, post-racialists view the data separately from the historical and contemporary contexts in which they exist, thereby masking the need to examine the larger structural forces fueling disadvantage.

If post-racialism is here to stay, then at some point society’s need to be free from feelings of responsibility for the consequences of decades of racial oppression must be divorced from questions of the Court’s power to correct existing racial disparities. In other words, we should speak of post-race as an aspirational goal of equal protection doctrine, not as a descriptive reality. As this Essay has demonstrated, however insignificant many now believe race to be, it would be unconscionable to imagine our equal protection doctrine as ultimately having no power to cure the lingering effects of this nation’s horribly racist past.<sup>189</sup> Until our reality—in the form of statistical data detailing improving life circumstances across race—matches our aspirations, then racial categories and the effects they have created should be the subject of meaningful review within our courts. With regard to this post-post-racial plea, another quote from an opinion in *Bakke* is instructive: “In order to get beyond racism, we must first take account of race.”<sup>190</sup>

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185. See *supra* notes 55, 169 and accompanying text.

186. See *supra* notes 57, 75 and accompanying text.

187. See *supra* notes 88–90 and accompanying text.

188. See *supra* notes 58, 75 and accompanying text.

189. This was essentially the point of Justice Marshall’s impassioned dissent in *Bakke*. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., dissenting and concurring).

190. *Id.* at 407 (Blackmun, J., dissenting and concurring).